MISSISSIPPI LAW JOURNAL

SYMPOSIUM

INDUSTRIAL PROPERTY RIGHTS: AN INTERNATIONAL PERSPECTIVE

USING LONG-ARM JURISDICTION TO ENFORCE MARITAL OBLIGATIONS

Carol Elaine Anderson

Spring 1971

VOLUME XLII NUMBER 2

MISSISSIPPI LAW JOURNAL

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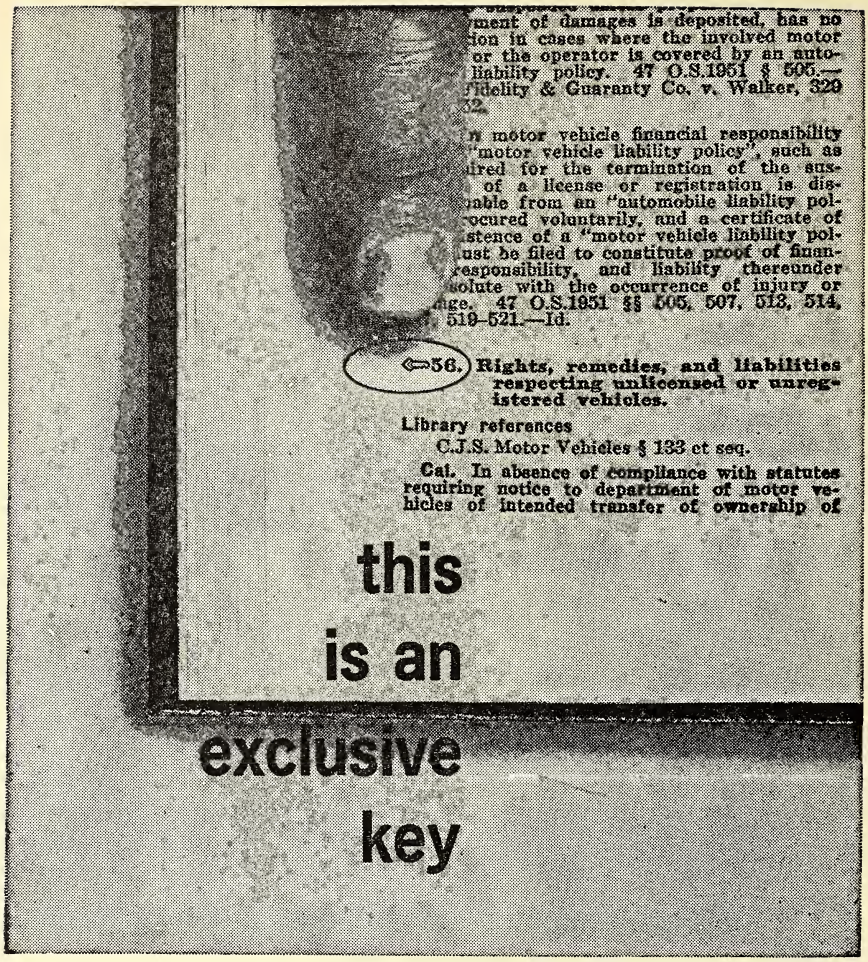
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VOLUME XLII **SPRING 1971** **NUMBER 2**

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Entered as second class matter, November 25, 1936, at the Post Office at University, Mississippi, and Baton Rouge, Louisiana, under the Act of Congress of March 3, 1879.
Published in Winter, Spring, Summer, and Fall
$8.00 Per Annum $2.50 Per Current Number
EDITORIAL AND BUSINESS OFFICE, UNIVERSITY, MISSISSIPPI

Mississippi Law Journal

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SYMPOSIUM

INDUSTRIAL PROPERTY RIGHTS: AN INTERNATIONAL PERSPECTIVE*

*Stephen Gorove***

There are many ways in which individuals and organizations can engage in the ever expanding stream of international commerce. Some of the more important and well-known manifestations of such participation include direct sale to foreign importers and distributors, the setting up of export associations, the establishment of foreign branches and subsidiaries for distribution or for both manufacture and distribution, the launching of joint ventures by American and foreign companies and many others.[1] All these methods have some distinct advantages as well as disadvantages, and it is up to a competent counsel to determine which method would best suit the client's interests. The advantages or disadvantages may frequently relate to production and labor cost differentials, transportation and shipping expenses, tariff barriers and other trade restrictions, foreign exchange controls and tax considerations. The success or failure of some of the foreign business endeavors is frequently influenced by additional factors, such as differences in language, legal system, customs, consumer attitudes and many other problems, including political, economic and psychological considerations.[2]

A significant portion of American penetration of foreign markets takes place through the techniques of licensing industrial property rights. This method is particularly helpful when the disadvantages of a distributorship agreement outweigh its advantages, when exports of finished or semi-finished products or direct manufacture by an American firm of such products in a foreign country either independently or through a joint venture is undesirable or unfeasible.

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* This paper is an elaboration of the author's address before a Symposium on "Industrial Property Rights: An International Perspective," which he chaired on March 3, 1971 at the University of Mississippi School of Law.

** Chairman of the Graduate Program of the School of Law and Professor of Law, University of Mississippi School of Law.

[1] A comprehensive treatment of these subject matters, with extensive bibliographies, may be found in W. SURREY & C. SHAW, A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS (1963).

[2] *See* Gorove, *Breaking the Trade Barriers: Legal Problems of International Businesses*, 38 MISS. L.J. 365, 368 (1967); Timberg, *Foreign Licensing Programs: Their Planning and Formulation*, 50 J. PAT. OFF. SOC'Y 554 at 556 (1968).

The rights granted in foreign licensing agreements may involve patent, trademark and know-how rights. Ownership or control of a U. S. patent does not automatically provide protection in other countries or provide the basis for a license grant to a foreign company. Similarly, a U. S. company does not automatically acquire its trademark rights abroad. It does so only by use and/or registration in each country in which it desires protection. While know-how rights can be licensed alone, it is common practice to combine them with a patent or trademark right whenever this is possible.

One of the initial but important questions that a U. S. company has to face involves what Andrew Power calls selection of the "right licensee."[3] This is particularly significant in view of the risks that the licensee may become a competitor upon expiration of the license. In such cases the formation of a joint venture with the licensee may seriously be considered.

In any licensing arrangement it is necessary to keep in mind that what is being licensed is the patent or trademark registered in the foreign country. Therefore, the selection of the particular country or countries in which the U. S. company should file patents or register trademarks may pose another important problem.

International licensing necessarily entails a careful drafting of the appropriate licensing agreement. While there are some standard provisions, there are a number of significant points which must be carefully analyzed prior to the final drafting. This is particularly true in protective clauses especially in exclusive licensing agreements. But it is also true in connection with the royalty clauses where special attention may have to be given to tax considerations and to various problems which may arise out of the repatriation of profits. In addition, the granting back of license to the licensor may involve special problems of antitrust law, not only those of the United States, but also those of foreign countries.

Careful consideration should be given in license agreements to provisions for arbitration and other procedures of settlement in case of dispute. In this respect, questions may arise as to whether the agreement is to be interpreted in accordance with the laws of the state of the licensor or that of the licensee.

In dealing with industrial property rights abroad, the corporate attorney must keep in mind the rich network of bilateral and multilateral international agreements which offer various benefits and safe-

[3] *See* Power, *Licensing Agreements*, 42 Miss. L.J. 169 (1971).

guards for the protection of such rights. Of course, here, a wide range of questions may be asked.

What are the constitutional provisions and how do these fit into or influence our operations in the international patent arena? What are the international agreements providing protection in this field? What are some of the most recent developments relating to the body of international patent law and what are the particulars of the recently negotiated Patent Cooperation Treaty?[4] What are the advantages of proceeding with an international patent application under the Patent Cooperation Treaty instead of the Paris Convention of 1883?[5] Similar questions may be asked in relation to the international protection of trademarks. First of all, should a company enter the international arena and, if so, what kind of trademark should be adopted? Should the company continue to use its domestic trademark internationally or should it select a separate trademark for each foreign country? Furthermore, in what countries should the trademark be registered? The questions could be multiplied almost indefinitely but enough has been said to indicate the general scope of the range and depth of subjects which are discussed in the ensuing pages.

The first of the four papers deals with the Patent Cooperation Treaty which may be regarded as a belated response to what has been termed an "international patent crisis" resulting largely from the ever-growing backlog of patent examining offices brought about by increased number of patent filings and an ever-increasing mass of "prior art."[6] The second article examines more generally problems of international patents. The third contribution explores the already intimated problems of international licensing, whereas the fourth article focuses on problems of international trademark law.

[4] For a text of the Treaty which has been under development since 1966 by the United International Bureau for the Production of Intellectual Property (BIRPI) and was signed in June 1970, see 63 DEP'T STATE BULL. 45 (1970).

[5] International Union. Convention of the Union of Paris of March 20, 1883, for the Protection of Industrial Property (commonly known as the "Paris Convention"). 67 Stat. 1789 (1931-1933), T. S. No. 834.

[6] Goldsmith, *The Proposed International Patent Cooperation Treaty*, 55 A. B. A. J. 955, 956 (1969).

THE PATENT COOPERATION TREATY

*Rene D. Tegtmeyer**

I appreciate this opportunity to speak about our Country's interest in international industrial property rights and most particularly the Patent Cooperation Treaty.[1] It might be worthwhile to discuss some background to put the Patent Cooperation Treaty in perspective and to illustrate its purposes and intended advantages before describing some of the provisions of the Treaty itself.

Although I realize that I may be becoming a bit basic, I'd like to start by reviewing with you the fundamental principles of our patent system. The framers of our Constitution included in that document the power of the Congress:

> To promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries; . . .[2]

Wisely and most probably with a specific intent, the Constitution speaks generally of promotion of "the Progress of Science and the useful Arts." It could have been specific and referred only to the most obvious means by which the patent right encourages progress, that is, by the disclosure of technology which might otherwise be maintained in secrecy in return for the patent right, and by providing through the patent right an incentive to invent; but, it did not. The incentives of the patent system, of course, go much further and include not only the incentives to invent and disclose, but also the incentives to invest, not only in research and development, but also in the development and commercialization of new inventions so that their benefits are fully realized. Furthermore, an incentive to compete forces the competitors of a patent owner to find other satisfactory, or even superior, inventions with which they can compete with that patent owner.

These same incentives work on a worldwide basis, wherever a free economy and a patent system exist. In this context, as our own patent system is of value to the businessman, the international patent arena is of value to us collectively as a country as well as to U.S. business individually. The proof of the pudding is the highly favorable balance

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* Acting Assistant Commissioner, U.S. Department of Commerce, Washington, D. C.

[1] The Treaty can be found in 63 DEP'T STATE BULL. 45 (1970) [hereinafter cited as TREATY].

[2] U. S. CONST. art. I, § 8.

of payments associated with U.S. owned technology. The favorable balance resulting from royalties, license and rental fees associated with the licensing of patents, knowhow, and similar services totals nearly one billion dollars a year. For the total effect of international patent protection on U.S. business interests abroad, we must also consider the export and U.S. owned foreign manufacture which are stimulated by U.S. owned foreign patent protection, although these benefits are not capable of determination in statistical terms. Our only tool for measuring the significance of foreign patent protection, outside the royalty income from the licensing of technology including patented technology, is the number of patent applications currently filed in foreign countries by U.S. nationals. These presently total about 135,000 applications a year. Many of these are applications for the same invention filed in different countries. The 135,000 applications are based upon about 25,000 separate inventions.

Patent protection, as we know it today, is territorially limited. With the exception of thirteen former French colonies in Africa which have joined together in a regional organization to issue a single patent in all thirteen countries,[3] a patent issued in any one country provides the owner an exclusive right only in that country. Accordingly, it is necessary for the Mississippi businessman, or any businessman for that matter, to file a separate application for patent in each of the countries in which he desires protection. Although a number of regional patent systems have been proposed and are under consideration, such as the proposed system for the European Economic Community, there are no existing treaties, other than the African agreement, which provide for a single patent or even an application good in more than one country.

Wide variances in laws among countries have provided a formidable obstacle to any agreement providing for a patent with extraterritorial effect. This hurdle may be overcome with the European patent proposals now being considered. However, the divergences in laws among the European countries are not so great.

The only really significant Convention of international breadth is the Paris Convention of 1883.[4] The Convention has been revised a number of times, most recently in Stockholm in 1967.[5] This Convention has been of tremendous significance in insuring national treatment for the nationals of all member countries in obtaining and maintaining industrial property rights in seventy-eight member countries and in pro-

[3] The text of this treaty can be found in 2 INDUSTRIAL PROPERTY 66 (1963).
[4] 47 Stat. 1789 (1931-33), T.S. No. 834 (proclaimed Mar. 6, 1931).
[5] *See* 6 INT'L LEGAL MATERIALS 806 (1967).

viding for a right of priority in filing patent and trademark applications. The Convention has a number of other provisions of importance; but its national treatment and priority provisions are the most significant.

The United International Bureau for the Protection of Intellectual Property (BIRPI), is located in Geneva, Switzerland. It is an organization established some years ago to administer a number of intellectual property conventions including the Paris Convention. In April of 1970, BIRPI underwent a reorganization and is now known as The World Intellectual Property Organization (WIPO). Because of the need to facilitate the acquisition of patents on an international basis, BIRPI was asked in 1966 to undertake urgently a study to reduce the duplication of effort involved in the filing and processing of separate applications on the same invention in a number of countries. Pursuant to this recommendation, BIRPI instituted a series of meetings of consultants representing the major countries, and a series of meetings of experts representing larger groups of countries from 1967 into 1970 to assist them in carrying out their study.

These activities culminated in the Washington Diplomatic Conference on the Patent Cooperation Treaty which was held from May 25 to June 17, 1970.[6] Seventy-seven states and a number of international organizations were represented at the Conference. The United States Delegation was co-chaired by the Commissioner of Patents, William E. Schuyler, Jr., and included representatives of the private sector both from the bar and industry. The Treaty was signed on June 19, 1970, by twenty states including the United States.[7] The Treaty was open for signature by other States until December 31, 1970, and a total of thirty-five signed by that date. Not one has yet ratified the Treaty.

The Treaty will come into effect when eight countries have ratified it.[8] However, four of these eight countries must be ones having major patent activity as defined in the Treaty.[9] It is not likely that the Treaty will be ratified by the requisite number of countries until at least 1974 or 1975.

The general purpose of he Treaty is to simplify the filing of patent applications on the same invention in different countries. To this end, the Treaty provides centralized filing procedures and a standardized application format. The Treaty is optional and in no way diminishes the rights that an applicant may have under the Paris Convention.[10] The right

[6] *See* Dep't of State Newsletter, Aug. 1970, No. 112, at 16.
[7] *Id.*
[8] TREATY, art. 63, § (1) (a).
[9] *Id.*
[10] *Id.* art I, § 2.

of Priority of the Paris Convention is equally recognized under the Patent Cooperation Treaty.[11]

Under chapter I of the Treaty,[12] the applicant files an international application generally in the patent office in his own country. The application is filed in an "agreed language" (English for the U.S. applicant), in a standard format, and includes the designation of those member states in which the applicant desires protection. The international application will be subject to an international fee at the time of filing. The international application has the effect of national applications in each of the designated states. The payment of national fees and translation expenses and national processing of the application in the designated states is deferred until twenty months from the priority date. An international search report will be prepared in accordance with standards set forth in the treaty by one of a number of International Searching Authorities. For U.S. applicants the Searching Authority will probably be the U.S. Patent Office. Copies of the search report will be transmitted to the applicant and the International Bureau. The applicant will then be given an opportunity to amend the claims of his international application before an International Bureau created within the World Intellectual Property Organization by the Treaty. Thereafter, copies of the international application and search report together with any amendments will be forwarded by the International Bureau to each of the designated states. The international application will normally be published by the International Bureau eighteen months from the priority date of the application. Finally, at the twentieth month, the applicant will be required to submit national filing fees and translations (if required) to those designated states in which he still wishes to obtain a patent. He will also be given the opportunity to amend the claims, the description and the drawings of his application again before each designated office.

Chapter II of the Treaty[13] to which contracting states may adhere at their option, provides a further procedure whereby under certain conditions an applicant may "demand" an international preliminary examination report for one or more elected states. Under this procedure, the applicant will be given an opportunity to amend his international application before an International Examining Authority which will then issue an advisory opinion on the novelty, nonobviousness, and industrial applicability of the claimed invention. Copies of the report will be sent to the applicant and the elected offices. National fees and translations will not be due, nor can national processing begin without applicant's re-

[11] *Id.*

[12] *Id.* art. 3.

[13] *Id.* art. 31.

quest, before the twenty-fifth month. Under this Chapter[14] the applicant will be given the opportunity to amend the claims, the description and the drawings of his application before each elected office.

Finally, a new chapter IV[15] was added to the Treaty at the Diplomatic Conference. This chapter should be of benefit to developing nations, in that it establishes information services which would facilitate acquisition of technology and technical information. Chapter IV also provides for the establishment of a committee which would organize and supervise technical assistance for developing countries in improving their patent systems.

We look upon the deferral of the time at which the applicant must commit himself by undertaking the expenses of translation, prosecution, etc., in each country from the twelve months priority provided by the Paris Convention to twenty or twenty-five months under the Treaty as the principal advantage of the Treaty. This advantage should permit the applicant to be more selective in which countries he ultimately decides to file by giving him more time to evaluate the strength of his potential patent and to determine his marketing plans. Other advantages include simplified filing through a single set of formal requirements under the Treaty. In future years, further advantages may be realized including significant assistance in examining applications to member countries.

The Treaty is not utopia, but we feel its benefits will be significant and that the Treaty will be a stepping stone to further progress in this area.

Commissioner of Patents, William E. Schuyler, Jr., has asked business, the bar, and interested associations and individuals to take a careful look at the Treaty and offer their advice on U.S. ratification. There are a number of options and reservations open under the Treaty. The advice of the private sector will be most useful in determining which of these options and reservations should be taken by the U.S. in adhering to the Treaty. The Administration, based on this advice, will likely seek the advice and consent of the Senate on the Treaty and seek the necessary implementing legislation later this year.

The development of the Patent Cooperation Treaty has demonstrated the desire of many countries to cooperate internationally in the industrial property field. We hope that we can look forward to continued and further progress internationally not only in the patent but also in the trademark field where similar developments are taking place although they are at an earlier stage of development.

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[14] *Id.* art. 41.

[15] *Id.* art. 51.

INTERNATIONAL PATENTS

*Rene Tegtmeyer**

I have been asked to discuss some of the more significant factors relating to the acquisition of international patent protection.

First, it might be useful to mention a few important facts which should be kept in mind by the businessman who desires foreign patent protection. One of these facts is the territorial limitation of the patent right. A patent obtained in one country has no extraterritorial effect; it does not provide protection in any other country. A separate patent must be obtained in each country in which protection is desired. There is presently one significant exception, the thirteen African nations, members of the African and Malagasy Union.[1]

Another fact which should be kept in mind in planning a foreign patent program is that it may not be necessary to obtain patent protection in every country in which the product covered by a patent may be marketed. It may be adequate to protect the product by patent only in the countries where the capacity to manufacture exists. This is particularly true where the product requires an expensive and sophisticated manufacturing facility, and where a wide market is required in order to be competitive.

Often overlooked by the individual or the small business which desires foreign patent protection is the need to file foreign patent applications in all of the countries where patent protection may be ultimately desired prior to the issuance of a patent in the United States and before any publication of the invention in this country. You are safe if you file your foreign applications within a year of the filing of your application in the United States and may claim priority of your application in this country under the Paris Conference of 1883.[2] Of course, this assumes that your United States application has been timely filed, that is, within one year of any public use or publication of the invention. It is, accordingly, very important that you plan your foreign filing program at an early date and, when doing so, look well into the future to determine, not only where your present needs will require patent protection, but also where your needs five or ten years hence will require patent protection.

When planning a foreign filing program, there are a number of

* Acting Assistant Commissioner, U.S. Department of Commerce, Washington D. C.

[1] *See* 2 INDUSTRIAL PROPERTY 66 (1963).

[2] 47 Stat. 1789 (1931-1933), T.S. No. 834 (proclaimed Mar. 6, 1931).

other considerations to be kept in mind in determining in which countries you should file. I'll mention just a few of the more important considerations. First and foremost, of course, are the budget limitations under which you are operating. This consideration requires a comparative evaluation of the invention being considered for foreign filing with other inventions and a determination of priorities. Equally important are your present and future marketing plans for the product involved.

The fee levels and attorney and agent costs in each country should be reviewed with an attorney. The costs of obtaining and maintaining a patent in different countries vary widely. If the country has an examination type patent system, costs will likely be higher. Another important fee consideration is the patent maintenance fee structure in many foreign countries. Fees are charged at regular intervals after the grant of a patent in a large number of countries. These fees can be rather high over the life of a patent and run to several thousand dollars in countries such as Germany. If these fees are not paid, the patent lapses and protection ceases.

The strength of the patent to be obtained is a most important consideration. Most parties will investigate the potential strength of their potential patent before undertaking significant expenses in a foreign filing program. Related factors include the sophistication of the judicial system in the countries being considered, their attitude toward patents and the degree to which business in the countries involved respect patents.

Other factors to be considered include such things as the licensing possibilities, particularly if you have no marketing plans, and the defensive value of a patent in the countries involved. Licensing, especially if you have know-how to offer, may be very profitable. Even if you have no marketing or licensing plans for the invention under consideration, it may be desirable to acquire patent protection to widen the umbrella of protection around related products which you are marketing or licensing to keep competitors away from your marketed products.

It may also be useful for you to be aware of some of the significant differences in patent laws of various countries. Many countries have registration systems under which a patent is granted on an application for patent after a brief review to see that certain formal requirements have been met. No examination is made as to the patentability of the invention. On the other extreme, a few countries conduct a full scale ex parte examination of all applications as to patentability. The criteria of novelty and nonobviousness of industrial advancement are applied. In some countries the subject matter must be capable of industrial application.

Between these extremes are wide variations in other countries. The deferred examination system is becoming more popular. The Netherlands, Germany, Japan and Australia have adopted systems of this nature. Under this system a search of prior art is made and reported to the applicant who may then amend his claims. Examination then stops, and the application is usually published eighteen months after its filing or priority date. For a period such as five years from publication or seven years from filing, the applicant or any other party may request a full examination upon payment of a fee. If warranted, a patent will issue. If no request is made during this period, the application lapses, and no patent can ever issue. In most cases, the application is republished after examination. Other parties are invited to oppose the issuance of a patent. If this opposition is unsuccessful or if no opposition is filed, the patent is issued. There are other variations between the extremes including the semi-registration system under which a search is made. The applicant may amend his claims, but a patent is automatically issued without further examination.

Many foreign patent systems also provide for the cancellation of patents after administrative proceedings, which may be initiated by any party, where the patent is found invalid. In the United States, a patent may be invalidated only by the courts.[3]

The term of a patent also varies by country. In the United States, patent protection begins upon issue of the patent and continues for seventeen years.[4] In many countries it begins on publication of the application or issuance of the patent and ends twenty years from the filing date. Where protection begins upon publication of the application, it is contingent upon the subsequent granting of the patent. Although no recovery for infringement is usually allowed until a patent issues, damages back to the date of publication may be recovered.

An important difference between our law and almost all other countries is the fact that the United States generally grants a patent to the first inventor if several individuals have invented an invention, whereas other countries will grant the patent to the first party who files an application. We regard our system as having important advantages over the foreign systems, although it does result in complicated contests between inventors in a few cases.

Many countries do not protect chemical products by patent, although they do protect chemical processes. In most cases, it is an infringement of the process patent to manufacture, use or sell a product made by the

[3] 35 U.S.C. § 282 (1964).
[4] 35 U.S.C. § 154 (1964).

patented process. A number of countries provide no, or only limited, protection for pharmaceuticals and food products or the processes for making them. Italy is the most important of these countries. India has recently severely curtailed the protection available for pharmaceuticals. The United States has no limitation on the granting of patents relating to chemical products or pharmaceuticals and foods.

Many countries also provide for the government issuance of compulsory licenses on the request of parties desiring licenses, generally on the basis that the patent is not being adequately worked in the country; that is, the public demand for the product covered is not being adequately met. In some countries, adequate working means by local manufacture, not by export. The United States, of course, has no such general provision in its laws. It should also be noted that few compulsory licenses are actually issued in the countries which provide for them.

This has been a very brief survey of international patents meant to inform you only as to the type of problems you must face in obtaining and maintaining patents internationally and not to make you any kind of expert on the subject.[5]

I would like to add one note concerning the proposed European Patent System which has been under consideration for some years since it may become a reality four or five years from now. The proposed European system would create a single European Patent Office which would issue a single European Patent effective in all the Member States. The processing system contemplated is of the deferred examination type.

Although the United States, because of the wide variances in our substantive law from that prevalent in Europe, will almost surely not become a member of that Convention, it may, nevertheless, be significant to our businessmen. It appears that our nationals will be able to file applications and obtain patents under that Convention, when it becomes a reality, even though we would not be a member. Previously, the proposed Convention had a provision which would have limited such access to countries which did not have provisions in their law which discriminated against foreigners. Europeans have claimed that the United States has such provisions in its law.

[5] For further discussion *see* Wayman, *Patent Protection In International Business Transactions*, 45 DENVER L.J. 64 (1968).

LICENSING AGREEMENTS

*Andrew Power**

It is a privilege to be at the University of Mississippi to participate in this program sponsored by the School of Law, the Lamar Society of International Law and the Department of Commerce. These three groups comprise an effective and practical team for bringing together some of the parts of this hard-to-get-hold-of international law field. As you know, an increasing number of universities are now publishing articles on international law, either in their Law Reviews or in separate Journals of International Law.

It is especially helpful to work with the Department of Commerce. As one studies and works in international law, the Department of Commerce will always be close by. It will be there to help with information on foreign markets and on individual firms abroad. It will also tell you what articles and technical data you can and cannot export or license from the United States under the Export Control Regulations.[1]

Regarding today's program I would like to state at the outset that I am not an expert in the field of patents and trademarks but in the course of my work, I do have occasion to become involved in licensing. In view of the troubled international water for foreign investors, we are likely to see an increase in licensing. It is certainly an area of less risk than many other forms of international trade. A few years ago I worked with our friends at the Department of Commerce to encourage firms in the pharmaceutical industry to expand trade with Nigeria. We seemed to be making progress when suddenly the Biafra war started. It is only now that things are returning to normal. Today almost any plane going to or from South America is probably carrying at least one lawyer on a trip to negotiate the nationalization of American investments. In the light of these events, it is well that we give serious consideration to the relatively safe licensing technique for sharing in the benefits of international trade.

The first step in an international program, if you are dealing with a product, should be a distributorship agreement. This is best from the point of view of the exporter who is paid by a letter of credit in U.S. Dollars and runs little more risk than he would in dealing with

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[1] Regulations Relating to Commerce and Foreign Trade, 15 C.F.R. subtitle B (1970).

a customer in Memphis. It is also in the best interest of our country, because export sales help our balance of payments position and keep domestic employment high. It appears, however, that more and more foreign countries are imposing restrictions on the import of finished goods and, in many cases, effectively closing out the market to U.S. exports in finished form. This is particularly true where a part of the production process can be completed locally. Let me give you an example from Mississippi. My company has a large plant in Gulfport that manufactures Phillips Milk of Magnesia. Our first choice would be to export the finished product in the familiar blue glass bottle; but we find that a foreign country has just completed construction of a large bottling plant, and we are forced to buy our bottles locally and process locally from the base materials supplied from the United States. When such a situation arises, and it is happening everywhere, we consider a license. In this case, what do we license? We cannot grant a patent license because milk of magnesia is not patented. We can grant a trademark license because we have the trademark "Phillips" registered all over the world, and the words "Milk of Magnesia" are still registered in certain countries and may be the subject of a trademark license in those countries. We also register the distinctive wrapper in which the product is sold. In addition to a possible trademark license, we recognize the possibilities of granting a know-how license. The local producer has no experience in making the product; by combining a know-how license with a trademark agreement, we can make available to him the technical skill and experience we have developed in manufacturing the product over many years. Not only does this help to support a higher royalty, it assures that the producer of the product bearing our trademark will have all the information necessary to make a product in accordance with our standards.

We have just illustrated the case of a distributor being blocked from a foreign market with his finished product and entering into a license agreement for his trademark and know-how. He will also be in a position to keep a further part of his business by selling the base materials to the local producer. In the above case, the U.S. exporter was dealing with an established agent in the country, but that agent may or may not have been in a position to take over the manufacture of the product. Whether you have had an established distributor in the country, or you are going into the country for the first time as a licensor, you are faced with the most important problem of all—to select the "right" licensee. It is important to remember that the firm you select will have the right to use your very important industrial property rights. In many cases he will be literally using your name. Iago told us "he that filches from me my good name robs me of that

which not enriches him and makes me poor indeed." Unfortunately, in the world of commerce it may be very profitable for someone to steal your good name. So we must be very careful in selecting a licensee. How does one select a licensee? From our experience, we believe that the best licensee is generally one who has an efficient manufacturing operation and manufactures and distributes the products of our industry, but not the particular products of our line.

It frequently happens that we are approached by eager and conscientious prospective licensees who lack the technical skill required to manufacture the products in accordance with our standards. Despite their very good intentions such an arrangement is unlikely to work very well unless you spend considerable time and effort and, for all practical purposes, take over the business. On the other hand, there are risks in selecting as a licensee the largest manufacturer and distributor. Although he is competent, he may be so busy he will not give your products sufficient attention. If this should be the case, you might wish to consider limiting him to the manufacture and have the goods distributed by another smaller distributor. In any event, careful attention should be given to the selection of the licensee.

How does one guard against the risk that upon the expiration of the license the licensee will become a competitor with its own product having acquired your know-how during the years of the license? If a trademark license is involved, during the term of the license, the licensee has been promoting your product. You will have a good headstart on any similar product he may introduce. In any event, the licensor cannot continue to exercise the rights under his patent if the term of the patent has expired.

One way in which you can continue to share in your licensee's continuing business in your invention is to form a joint venture with the licensee. During the period of the license, the royalty would be paid by the joint venture company. On the expiration of the license you would continue to share in the profits of the business through dividends. Of course, if a trademark is involved, you can continually renew the trademark registration and enjoy the benefits of a license from the joint venture.

When we grant a patent or trademark license overseas, we are not licensing a U.S. patent or trademark, but rather an industrial property right that exists under the laws of the foreign country. It is necessary therefore, that we have the patent or trademark registered in the foreign country. In the case of patents, except for importation patents in certain countries, a patent will not issue if there has been a public use anywhere. It is necessary therefore to either file applica-

tions overseas before your U.S. patent issues or file within one year of the original application under the Paris Convention for the Protection of Industrial Property of 1883.[2] In the case of a Convention filing, the foreign member country will give your application the same date as the U.S.

In view of the above, it is necessary for a firm or individual who wishes to engage in licensing of any scope to have a patent and trademark program. This is particularly true in the case of patents, because filing patents around the world can be expensive. In order to decide in which countries patents should be filed, most companies have a patent committee or team comprising marketing, technical and legal people. When a new invention comes along, they study the market potential for the product and agree on a program to file patent applications in a certain list of countries.

With respect to trademarks, the patent requirements of no prior public use does not exist. We can register our trademarks at any time, providing we are able to avoid a conflict with the same or a similar word already on the local trademark registry.

After finding a suitable licensee, it would be necessary to draft a license agreement. Unfortunately, there is no such thing as a standard license form. The most one can say is that there are certain provisions which generally appear in license agreements.

The agreement should begin, of course, with the full name and description of the parties, followed by a descriptive term, generally "Licensor" or "Licensee." Although the recitals in the "whereas clauses," do not have the effect of those that follow in the agreement, I find the "whereas clauses" very useful in setting the background for the license. These clauses generally provide that the licensor owns certain enumerated industrial property rights and that the licensee is desirous of securing a license to use the said rights.

It is especially important in foreign licensing agreements, where translation problems and different legal systems can cause difficulties in interpretation, to have a clause defining the principal terms such as "patent rights," "territory," "licensed products," "net selling price." In a patent license it is well to set out as much information as possible regarding the patent rights being licensed, listing for each country the application number, the filing date, the patent number and priority date. As to the definition of "net selling price," a definition similar to the following would probably be adequate:

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[2] 47 Stat. 1789 (1931-1933), T.S. No. 834 (proclaimed Mar. 6, 1931).

> Net selling price shall mean the gross selling price of the finished products less packing expenses, transportation and insurance charges, customary discounts allowed and taken, credits and allowances given or other governmental charges levied directly on the sale, transportation or delivery of the finished products by the Licensee.

After the "whereas clause" and the definitions we generally have the granting clause. This raises the question, as to whether the license should be exclusive or nonexclusive. In the example I cited earlier of Phillips Milk of Magnesia, we would probably give an exclusive license, because for better or worse, we would be giving the licensee the right to produce our product under our trademark. If you grant an exclusive license, what protection can you put into the agreement? For one thing, you can include minimum sales requirements and set them somewhat higher than a mere token figure—possibly on a rising scale so that the licensee will have to improve his performance each year. If the licensee complains that he may have a single bad year and lose the license, you can double the figure and have him spread the minimum over two years. You can also provide that the licensee will spend certain minimum amounts on the promotion and advertising of your product. All of this is in addition to a clause requiring the licensee to expend his best efforts under the license.

The granting clause generally contains language similar to the following: "Licensor hereby grants the Licensee an exclusive right and license to make, have made, use or sell the licensed products in the territory." The grant of an exclusive license generally gives the licensee the right to bar products of the licensor. It might be well, therefore, if the licensor wishes to retain the right to sell directly to the market, to have a provision providing that the exclusiveness granted to the licensee shall not apply to the licensor. If it is agreed that the licensee is to have the right to sub-license, then the granting clause would be the appropriate place to make the provision and provide that the written consent of the licensor must be obtained for such sub-license.

As the purpose of the license for the licensor, at least, is to collect royalties, special attention should be given to the royalty clause in the agreement. How much royalty can you obtain from the licensee? This is purely a matter of negotiation—there is no limit set by U.S. law. It may be, however, that you cannot rely on negotiating strength alone in certain foreign countries. In Japan, for example, any industrial property license must be approved or validated by the government. If you are negotiating with a Japanese license, you must remember that when you finally reach agreement between yourselves, you must obtain

the approval of the government. If your royalty rate is higher than that allowed by the government, you will have to bring it down. The government will also consider other provisions of the contract, particularly the term of the license. Incidentally, while patent licenses are generally given for the life of the patent, Japan may limit the term to a shorter period.

A U.S. licensor will probably wish to be paid in U.S. dollars. This should be spelled out in the agreement together with a statement that the exchange rate shall be the one prevailing at the time the royalty is due.

It might be appropriate at this time to mention certain tax considerations. We generally provide that any taxes on the royalty levied by the foreign country shall be borne by the licensor and if the licensee is permitted, he shall pay the tax and send the receipt to the licensor. It is well to provide that all other taxes in connection with the license shall be borne by the licensee. Where there is a tax treaty and the U.S. licensor does not have a permanent establishment in the licensee's country, the royalty income will generally not be taxed locally. Where the income is taxed by the local country, the tax receipt collected by the licensee will support a tax credit from the United States.

Taxes are very significant when you are prepared to grant an exclusive license to transfer substantially all of the rights involved. If you held the patent for more than six months and your agreement is a license to "make use and sell" for the life of the patent and you do not tie any strings to the agreement, the royalty income may well qualify for capital gains treatment.

Before leaving royalties, we should again mention the advisability of including a minimum royalty provision in the agreement. The royalty section of the agreement should also include provisions for submitting detailed reports on the sales of the products governed by the industrial property rights as well as the right of the licensor to examine the licensee's books.

If the license is nonexclusive, the licensee will probably want a most favored nation clause which would give him the benefit of any lower rates given by the licensor to other licensees.

Another customary provision in patent license agreements relates to improvements made by the licensee or licensor to the patented products or invention. These paragraphs generally provide that each party shall license the other to use the improvements. This question

of granting back a license to the licensor can present a problem of antitrust law, particularly where the licensor is dominant in the field.

Although the leading case on grantbacks, the *Transparent-Wrap*[3] case, is still law, it has been under increasing criticism. In the course of a talk to the Michigan State Bar Convention in Detroit on September 25, 1969, Mr. Ronald Donnem, Director of Policy Planning for the Antitrust Division of the Department of Justice made the following comments:

> In its 1947 *Trans-Wrap* decision the Supreme Court held that unlimited grantbacks of improvement patents are not illegal per se. This decision has not been directly overruled despite widespread criticism. We expect to bring cases under Sherman Act section 1 against patent licenses which require an assignment or license grantback of all improvement patents. It is our view that the right to a nonexclusive licenseback on improvements, with reasonable royalties going to the improvement patentee, may be a legitimate provision in the licensing of a basic patent. However, assignment grantbacks tend unduly to expand the patent monopoly and to stifle research and development efforts on the part of licensees, contrary to the public interest. Although we think it is distinguishable, the Supreme Court's *Trans-Wrap* decision may in some degree be questioned by this challenge.

Another recent U.S. case, *Lear v. Adkins*,[4] upset a long standing practice of including in license agreements a clause that the licensee will not challenge the validity of the patent granted by the licensor. To what extent are these cases significant in drafting a foreign licensing agreement? We must start with the recognition that U.S. antitrust law does apply in foreign trade as well as domestic business. We know this from a whole series of famous cases involving international licensing agreements which were held to be in violation of the U.S. antitrust law. Within the past year, the antitrust division indicated that it had not lost its interest in international licensing agreements when it brought an action against Westinghouse Electric Corporation and two Japanese companies Mitsubishi Electric Corp. and Mitsubishi Heavy Industries. While your proposed license may or may not come within the scope of the U.S. antitrust law, it would be advisable, when drafting foreign license agreements, to keep in mind the limitations established under U.S. law.

In addition to the U.S. antitrust laws our licensor should consider the possible effect of the developing body of antitrust laws in

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[3] Transparent Wrap Machine Corp. v. Stokes & Smith Co., 329 U.S. 637 (1947).
[4] Lear Inc. v. Adkins, 395 U.S. 653 (1969).

other countries. This is particularly true of individual European countries such as Germany, England and France, as well as the European Economic Community. Article 85 of the Rome Treaty, establishing the European Economic Community, prohibits any agreements between enterprises, any decisions by associations of enterprises and any concerted practices which are likely to affect trade among the member states and which have as their object or result in the prevention, restriction or distortion of competition within the Common Market.

We mentioned the role of the Department of Commerce in respect to the export of technical data or the products produced from it. Before exporting any such data, we should review the Export Control Regulations.[6] It may also be necessary in certain cases to refer to the Foreign Assets Control Regulations of the Treasury Department.[7]

License agreements generally include a clause stating which law shall be the controlling one and they frequently provide for arbitration in the event of a dispute. The first thought is to provide that the agreement shall be interpreted in accordance with the laws of the licensor's state. This can create problems in proving foreign law. For my part, I would prefer to have the controlling law be that of the country of the licensee or in certain cases have no provision at all with respect to controlling law.

I recognize that there are strong arguments in favor of arbitration. As a personal preference, I would rather not have the dispute submitted to arbitration. I think this is due to a feeling that the foreign law, even though it may be different, is still law. I would feel more comfortable with it than I would with an arbitrator's decision.

A trademark license has many provisions similar to those of the patent license. There are, however, some areas that require special emphasis. As with the patent licenses, it is very important to show clearly the identity and scope of the property right being licensed. In the case of the trademark license the paragraph defining license trademarks should list the trademark or trademarks exactly as registered in the country of the licensee with the registration number, date of registration and a description of the goods which it covers. The licensor of the trademark should represent and warrant that it is the sole and exclusive owner of all right title and interest in and to the trademarks free and clear of limitations and encumbrances and that no limitations or restrictions, governmental or otherwise, exist with respect

[6] 298 U.N.T.S. 11 (1958).
[6] Technical Data 15 C.F.R. ch. III Part 379 (1970).
[7] Foreign Assets Control Regulations, 31 C.F.R. ch. V Part 500 (1970).

to the trademarks as they are applied. In the trademark license, as in the patent license, there should be a secrecy clause in which the licensee agrees not to disclose the technical data relating to the products covered by the industrial property rights and to use its best efforts to prevent any disclosure thereof by its employees, independent contractors, representatives or customers.

It is especially important to provide that the licensor shall have the right to test the quality of the products made by the licensee under the licensed trademarks, take samples and make appropriate tests. As a general rule, it might be well to remember that in many countries trademark licensing is a relatively new development. Until recent years these countries considered trademarks much as they do a person's name and not subject to a license. Today the English Commonwealth countries and other areas now permit licensing; however, they have strict requirements to establish that the registered user of the marks is using them under the control of the owner. We should, therefore, in all trademark agreements make it clear that the owner of the trademarks is exercising control over the products being sold with the trademarks as well as advertising and promotional material relating to it.

INTERNATIONAL TRADEMARK LAW

*L. M. VanHoozer**

Any company that wishes to market a product in the international arena has a choice of selecting a foreign market area and then undertaking a program for the proper protection for the trademark in the defined area, or entering the market area too quickly, as many companies do, only to be faced with a situation in which the trademark has been pirated away by some third party in that particular market area. The first choice necessitates time, cooperation between the attorney and management, and hard work, whereas, the latter choice offers a rude awakening and once again causes the attorney to say, weakly, "I told you so."

The difficulties of establishing and maintaining a worldwide or any international trademark program of protection and maintenance are numerous. Various problems exist in the United States in the selection, adoption, use and protection of any trademark. The difficulties in maintaining and policing a trademark in the United States are only exceeded by the act of maintaining and policing a trademark in the international market, for today, there are approximately 200 trademark jurisdictions in existence around the globe.

A trademark may be briefly defined as any word, symbol or device, or any combination thereof, used on the goods of a particular maker or seller to identify their source or origin and distinguish them from those made or sold by others. The general functions of a trademark are to distinguish the product from those of a competitor, to serve as a guarantee of consistency of quality of the product, and to help advertise and sell the product.

Internationally, trademarks have been classified under the general category of industrial property rights, together with other assets, such as patents, technical know-how, designs and copyrights. Since a trademark designates origin, its use should be identified with one owner so that the general public will know with whom it is dealing and may expect to receive the quality of the product manufactured by that owner. Legislation, case law and procedures for obtaining, protecting and exercising property rights under a trademark vary in each country. The United States operates under a more sophisticated system for the protection and maintenance of trademarks than most other countries. In the United States, for example, if the mark becomes generic through indiscriminate

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use by the general public it may result in the loss of the ownership of that mark. The loss of "aspirin," "milk of magnesia," "escalator" and most recently "yo-yo" as trademarks illustrates this point. However, in Italy, a trademark becoming a generic term is not grounds for the cancellation of the exclusive rights of the owner, although, if the owner allows such use, one can argue that he has waived his rights to the mark. In France, the rights of a trademark holder may be lost as the result of an act of renunciation of the ownership of the mark and not by its becoming a generic term.

After the decision is made to introduce a product in the international market, the initial problem is the selection or adoption of a trademark. Should your company continue the use of its domestic trademark in the international market, or should a different mark be used in each country? What does the existing trademark or the newly selected trademark mean when translated from English into the national language? Recently, a U. S. company manufacturing agricultural products wished to market its products in France. The product was marketed in France using the U. S. mark, however, the French translation of the U. S. trademark was "I can get it for you cheap," which lessened the appeal of the product and resulted in weak sales. Another U. S. company wished to use its domestic mark in the Arabic countries. Unfortunately, one U. S. mark translated to "dog" and another to "pig," which to the Arabs represents the lowest form of life. This basic problem, although of a serious nature, is often overlooked by corporate management.

Nationalism is a problem to consider. The American image abroad is not as well respected as it once was. United States Rubber Company recently changed its mark to UniRoyal to avoid any connotation of a U. S. affiliation in the countries in which it maintained local subsidiaries. Many other companies have followed this pattern.

A major problem facing companies who wish to enter the international market is to avoid a patchwork or crazy quilt approach to a worldwide trademark protection and management program. If a decision is made to enter the international market, even in only a few foreign countries, a clear understanding of the objects and scope of the marketing program should be transmitted to the corporate counsel or to an outside attorney who is to develop the international maintenance and protection of the trademark. The attorney should be a party to all initial discussions even if such marketing program is in the planning stages.

Regardless of the market area, as much advance notice as possible should be given to trademark counsel in order that he might make the necessary searches of existing or conflicting marks and obtain a general

understanding of the requirements of the country or countries into which the domestic company is to invade.

After the selection of a mark, care should be given to the country or countries in which the mark is to be registered. There exists no universal treaty or agreement linking all countries in the protection of trademarks. However, Europe has the Madrid Arrangement, Paris Union Convention and recently enacted the Benelux Treaty. In South America, the Pan-American Convention of 1929 is in existence. Africa and Malagasy maintain a similar convention.

An inequitable situation has been created by those countries requiring a home registration prior to obtaining a trademark registration in a country other than the owner's country of origin. The trend today is the repeal of the requirements of the existence of a home registration, as evidenced by recent legislation in France. Some countries accept the principle of reciprocity. That is, if the owner is a national of a country not requiring home registration from nationals of a country where protection is sought, then on a basis of reciprocity one should be able to secure registration without a home registration requirement.

The Pan-American Convention of 1929 affords the basis for overcoming home registration requirements in certain Latin American countries. In Honduras, Guatemala and Panama, home registration requirements exist under national law, but the three countries recognize treaty obligations. By securing a registration in Nicaragua, which does not have a home registration requirement, and where there is a speedy registration procedure, one can acquire a basis for an application in Honduras, Guatemala and Panama, and overcome the home registration requirement. In some Commonwealth countries the registration of a trademark in Great Britian is required. In most cases, a registration in a country which is a colonial country affords protection throughout its colonies, as in France and Portugal.

After a mark has been selected and a definite program has been instituted to introduce that mark into a given market area, the U.S. company should proceed with the registration of that mark. At this point consideration is given to the trademark laws of the countries in which a registration is to be obtained. In many countries the procurement of a registration creates the exclusive rights to a trademark. In other countries, actual use of the mark in that country is a condition precedent to obtaining a registration and the creation of any right to the mark. A third classification allows the procurement of a registration based on an intention to use the mark in the particular country. The United Kingdom, Ireland and other common law jurisdictions adhere primarily to the "use" con-

cept. The other jurisdictions are commonly referred to as either strict or lax "registration countries." France and West Germany, and with certain variations, Italy, are examples of registration countries.

In all cases, the maintenance and protection of the trademark requires actual use either initially or within a statutory period of time. Generally, a trademark is subject to cancellation or attack by a third party if that mark is not used within a given period of time, five years in Germany and France, three years in Italy. If you wish to protect your mark in a "use" country, advertising, token sales and various other devices can be used to obtain at least a limited use, which in most cases will suffice to allow you to obtain a registration.

Australia, Argentina and Monaco have been called "pirate's heaven." Through the peculiarities of the registration procedures, use or nonuse requirement, maintenance and renewals, these three countries have made it easy and popular to register trademarks with no intent to use them except to sell to the original foreign owner who seriously wishes to use his mark on products for sale in those particular countries. Many well known U. S. trademarks were registered by nationals in Australia and were either resold or through working arrangements, involving economic considerations, were returned to the U. S. owners. A few U. S. trademarks to be found in Australia under these circumstances are Travelodge, Safeway, Avis and others. In Monaco, the problem is of a serious nature, for that country adheres to the Paris Convention, which would allow a registration to be acceptable by all other member countries. Treaty provisions, unfair competition, fraud and the theory of the "well-known" trademark are doctrines upon which the U. S. owner can base his infringement litigation if he chooses to sue the alleged infringing party in the courts of the country of registration.

In addition to the registration and post registration acts and procedures, trademark owners should be aware of the intricacies of licensing or assigning a foreign mark to an agent or subsidiary company. Many countries require that a trademark can only be assigned with the good will of the owner or that a trademark license can be granted to only one person or company. British practice countries generally insist on the filing of a formal document between the trademark owner and user designated as a registered user of the mark.

Registration notices in use in the United States are not universally acceptable. In Mexico, marca registrada, or marca reg., is required as proper notice, and in some instances must be accompanied by the name and address of the manufacturer. The notice "Trademark Registered" in English or translated into the national language usually affords adequate notice.

It is apparent that any company which has international aspirations should preplan its trademark registration and protection program and select a competent attorney in the particular country or countries in which the product is to be marketed. Only through a well-planned program can adequate protection be gained and any problem conquered.

USING LONG-ARM JURISDICTION TO ENFORCE MARITAL OBLIGATIONS

*Carol Elaine Anderson**

A current problem in the field of domestic relations is the limited scope of state long-arm statutes. Due to the restrictions in most statutes, states are unable to obtain in personam jurisdiction over a non-resident defendant and award a plaintiff a personal money judgment for alimony and child support regardless of the existence of any connected action for divorce. It seems inequitable to such a state's plaintiffs, usually estranged wives, that their counterparts in Illinois,[1] Wisconsin,[2] Idaho,[3] and Kansas,[4] are able to seek such relief within their own states.

Currently, in order to award alimony or child support, a court must obtain jurisdiction in personam.[5] If the husband is a non-resident, the court may acquire jurisdiction to enter a money judgment against him by service of process *within* the state or by his general appearance (emphasis added). But since child support and permanent alimony awards require personal jurisdiction over the defendant, service by publication will not confer proper jurisdiction.[6] An in rem proceeding for temporary alimony and attorneys' fees will usually lie against the husband's property situated in the state.[7] To provide more flexible relief, a "model bill" has been drafted after an analysis of the provisions and probable effects of those "marital long-arm statutes" which presently exist.[8]

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[1] ILL. REV. STAT. ch. 110, § 17 (1) (e) (1965).

[2] WIS. STAT. ANN. §§ 247.055 and 247.057 (lm) (1967).

[3] IDAHO CODE ANN. § 5-514 (e) (Supp. 1969).

[4] KANS. STAT. ANN. § 60-308 (b) (6) (1964).

[5] Glaston v. Glaston, 69 Cal. App. 2d 787, 160 P.2d 45, 47 (1945); Dorman v. Friendly, 146 Fla. 732, 1 So. 2d 734 (1941); Cohen v. Cohen, 187 N.Y.S.2d 394 (1959); Rigney v. Rigney, 127 N.Y. 408, 28 N.E. 405 (1891).

[6] Hekking v. Pfaff, 91 F. 60 (1st Cir. 1898); Adams v. Adams, 218 So. 2d 777 (Fla. App. 1969); Proctor v. Proctor, 215 Ill. 275, 74 N.E. 145 (1905); see generally, A. EHRENZWEIG, CONFLICT OF LAWS, § 71 (1962).

[7] *See, e. g.*, Pennington v. Fourth Nat'l Bank, 243 U.S. 269 (1917); Carter v. Carter, 147 Conn. 238, 159 A.2d 173, 176 (1960); Burkhart v. Circuit Court, 144 Fla. 176, 198 So. 21 (1940); State *ex rel* Nelson v. Williams, 249 S.W.2d 506 (1952).

[8] Personal service of process outside the state—

(1) Personal service of summons may be made upon any defendant outside the state, whether or not a citizen or resident of this state, if the defendant resided in this state, in marital relationship with the plaintiff for not less than six (6) consecu-

This article examines the most important aspects of this draft and similar legislation, considering the extent of the present need in light of available alternative remedies; the benefits and limitations; the legality measured by traditional and recent due process requirements; the interplay with both common law and statutory procedural protections against jurisdictional overreaching; and finally, the possible ultimate effect on the administration of justice.

This proposed draft is strongly supported by public-policy considerations. In the majority of states, the law leaves a wife without remedy when her husband leaves with all of his property. Of course, she may bring an original action where defendant resides or obtain a decree in her own state, domesticate it in defendant's state, and seek an adjudication of support and property rights there.[9] But the wife's state has a greater interest in this adjudication of support than does the husband's state.

It is the wives who need support the most who are least able to afford litigation across state lines. With the passage of the proposed draft, a plaintiff will be able to remain in the forum state and obtain a money judgment against a wandering spouse who can be personally served with process. Although the problem of execution will remain,[10] perhaps a non-resident defendant, realizing he will be subject to the jurisdiction of his wife's court, will be more likely to come to defend himself and his property. Furthermore, he may be less likely to abandon his duties of support since the advantage he would gain by abandonment will have been diminished by the judgment obtained against him.[11]

Although some difficulties have been alleviated by the general adop-

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tive months within the six (6) years next preceding the commencement of the action, or if the defendant committed, in this State, any act giving rise to the cause of action.

(2) If personal service of summons is made upon defendant under subsection (1), the court has jurisdiction to enter a judgment in personam against defendant in an action to determine a question of status or in an independent action for child support, alimony or property settlement. Such independent action must be commenced in the county in which the plaintiff resides at the commencement of the action.

See also companion bill entitled "Stay of Proceeding to Permit Trial in a Foreign Forum" at Appendix A, *infra*.

[9] McDuffie v. McDuffie, 19 So. 2d 511, 512–13 (Fla. 1944); Wooton v. Wooton, 283 Ky. 422, 141 S.W.2d 561, 563 (1940); Williamson v. Williamson, 183 Ky. 435, 209 S.W. 503 (1919); *see also* annotation of Shibley v. Shibley, 97 A.L.R. 1197.

[10] *But see* note 73, *infra*.

[11] *See generally*, Friedman, *Extension of the Illinois Long-Arm Statute: Divorce and Separate Maintenance*, 16 DE PAUL L. REV. 45, 47 (1966).

tion of the Uniform Reciprocal Enforcement of Support Act,[12] court proceedings must still be held in the defendant's state; however, the wife is unable to give evidence in her behalf without travelling to defendant's forum.

One must agree that the state has a substantial interest in domestic relations.[13] The state is financially interested in the welfare of an abandoned spouse, who will rely on the state for support in the absence of available judicial relief. Where a husband and wife have maintained their domicile in one state until the time of separation, it is equitable that litigation over economic maintenance and child custody be within the jurisdiction of that state. The wife should not be required to follow the defendant from state to state in order to obtain support when the dispute could be equitably be settled in the home state.

Moreover, a marital long-arm statute would follow the trend of expanding forum state jurisdiction over non-residents having "contacts, ties, or relations" with the state. The non-resident motorist statute is almost universal.[14] Pennsylvania has even expanded in personam jurisdiction of its forum to the non-resident aviator.[15] Even more common are statutes which allow courts to reach individuals, corporations, or partnerships which have less than the traditional business ties with the state.[16] But more important are the statutes which directly confer personal jurisdiction over non-residents in domestic situations.[17]

The much discussed, and still present hurdle, encountered in many situations by the long-arm statutes is the requirement that the statute meet expressed standards of substantive and procedural due process. The *Pennoyer* Rule,[18] allowing a court personal jurisdiction only if process is personally served within the state, has been substantially modified. Courts have recognized that the strict application of this rule to family support cases has encouraged migratory divorce by shielding a spouse who wishes to avoid financial responsibility.[19] A nondomicil-

[12] *See, e. g.*, FLA. STAT. § 88 (1969).

[13] *See also* Yarborough v. Yarborough, 290 U.S. 202, 213 (1913) (dissenting opinion).

[14] *See, e. g.*, FLA. STAT. § 48.171 (1969).

[15] PA. STAT. tit. 2, § 1410 (1963). *See also* FLA. STAT. § 48.19 (1970) extending personal jurisdiction to non-resident aircraft operators.

[16] ALA. CODE tit. 7, § 199 (1) (1953 Cum. Supp.); ARK. STAT. ANN. § 27-340 (1947); MD. ANN. CODE art. 23, § 88 (d) (1951); N.J. REV. STAT. § 34: 14-55.1 (1937); VT. STAT. ANN., § 1562 (1947).

[17] *See, e. g.*, IDAHO CODE ANN. § 5-514 (e) (Supp. 1969); ILL. REV. STAT. ch. 110, § 17 (1) (e) (1965); KAN. STAT. ANN. § 60-308 (b) (6) (1964); WIS. STAT. ANN. § 247.055 (lm) (1967).

[18] Pennoyer v. Neff, 95 U.S. 714 (1877).

[19] Mizner v. Mizner, 439 P.2d 679 (Nev. 1968), *cert. denied* 393 U.S. 47 (1968).

iary now may be subject to the personal jurisdiction of the forum state in limited situations without personal service within the state.[20] A state may obtain jurisdiction if an individual causes effects in the state by omission or act done elsewhere, unless the nature of the effects makes the exercise of such jurisdiction unreasonable.[21]

The proposed statute meets the test of substantive due process laid down in *International Shoe*, which requires certain minimum contacts so that the suit would not offend "traditional notions of fair play and substantial justice."[22] The acts or conditions enumerated in proposed subsection (1) constitute such "contacts, ties, or relations" with the state, thus satisfying constitutional requirements.[23] Statutes similar to the proposed bill have already been tested in court and upheld."[24]

Compare the proposed section with the former California long-arm statute, CAL. CODE CIV. PROC. § 417 (1951) (repealed by Stats. 1969, c. 1610, p. 3373, § 21, operative July 1, 1970) which failed to restrict its out-of-state personal service to any specified contacts whatsoever. However, this statute had already withstood tests of constitutionality as to the acquisition of personal jurisdiction for an alimony decree against a non-resident defendant.[25]

The proposed draft also meets the test of procedural due process which requires a method of service adequate to give defendant actual notice of the action pending against him.[26] This second, or "notice," requirement is met by the provision for personal service of process. Hence, the defendant will receive actual notice of the pending action.

The reasoning behind the provisions of the proposed draft is best analyzed by a comparison of the draft to statutes of similar purpose from other states. The former California Statute has already been criticized.[27] Although a different statute was recently substituted in its

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[20] International Shoe v. Washington, 326 U.S. 310, 316 (1945).

[21] Hanson v. Denkla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Kahlberg Co. v. Western Hearing Aid Center, 359 Minn. 330, 107 N.W.2d 381, *cert. denied* 366 U.S. 961 (1961).

[22] International Shoe v. Washington, 326 U.S. 310, 316 (1945).

[23] *See* note 8, *supra.*

[24] Soule v. Soule, 193 Cal. App. 2d 443, 14 Cal. Rptr. 417 (1961); Scott v. Hall, 203 Kan. 331, 454 P.2d 449 (1969); Woodring v. Hall, 200 Kan. 597, 438 P.2d 135 (1968); Mizner v. Mizner, 439 P.2d 679 (Nev. 1968); Dillon v. Dillon, 46 Wis. 2d 659, 176 N.W.2d 362 (1970). *See also*, note 30, *infra.*

[25] Soule v. Soule, 193 Cal. App. 2d 443, 14 Cal. Rptr. 417 (1961); Mizner v. Mizner, 439 P.2d 679 (Nev. 1968).

[26] Milliken v. Meyer, 311 U.S. 357 (1940).

[27] See discussion, *supra.*

place,[28] the old section remains significant as the basis for the leading cases which hold that a general long-arm statute may relate to marital relations.[29] In *Mizner*, the Nevada Supreme Court felt that, in determining whether the judgment was entitled to full faith and credit, it could not ignore the construction placed by the California courts on the effect of extraterritorial personal service of process — and *must honor* such view (emphasis added).[30]

Recently the California legislature, in repealing its long-arm statute,[31] replaced it with a one-line statement of general constitutional principle.[32] Although the California statute now presents an opportunity for the most extensive non-resident jurisdiction constitutionally allowable, it may just as easily operate as a restrictive statute, in view of the judiciary's traditional conservatism.

Hence, the new California statute may be an improperly large delegation of legislative power, vesting complete discretion in the courts without any guidelines of legislative intent.[33] There is an added disadvantage in the lack of judicial uniformity which will occur; lawyers will be unable to plan and advise with any measure of confidence. A state studying such a draft should find the California statute unsuitable as a model for its own proposed legislation. It is interesting to note that a very common state constitutional provision[34] (derived from John Adams' "Declaration of the Rights of the Inhabitants," *Massachusetts Constitution,* 1780), and which on its face appears similar to the new California general long-arm statute, had very early been extended by courts to apply to marital situations.[35] This judicial attitude may auger well for many

[28] CAL. CODE CIV. PROC. § 410.10 (Supp. 1969).

[29] Soule v. Soule, 193 Cal. App.2d 443, 14 Cal. Rptr. 417 (1961); Mizner v. Mizner, 439 P.2d 679 (Nev. 1968).

[30] Mizner v. Mizner, 439 P.2d 679 (Nev. 1968) held that in personam jurisdiction may be acquired over a non-resident defendant in alimony actions by extraterritorial service of process if: (1) a statute of the support-ordering state has authorized the acquisition of such jurisdiction in that manner, and (2) there exist sufficient contacts between the defendant and the forum relevant to the cause of action to satisfy "traditional notions of fair play and substantial justice."

[31] CAL. CODE CIV. PROC. § 417 (1951) (Repealed effective July 1, 1970).

[32] CAL. CODE CIV. PROC. § 410.10 (Supp. 1969) reads: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

[33] *See also* City of Auburndale v. Adams Packing Ass'n, 171 So. 2d 161 (Fla. 1965). See generally M. FORKOSCH, CONSTITUTIONAL LAW, §§ 173-187 (2d ed. 1969).

[34] Compare CAL. CODE CIV. PROC. § 410.10 (Supp. 1969) with FLA. CONST. art. 1, § 21 (1968) which provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

[35] *See, e. g.,* McDuffie v. McDuffie, 19 So. 2d 511-13 (Fla. 1944), involving full faith and credit.

state courts responding quickly and favorably to a carefully drafted marital long-arm statute.

More extensive legislative guidelines appear in the marital long-arm statutes of several states.[36] These guidelines must be examined to determine their effectiveness and possible applicability; the best provisions have been incorporated into, hopefully, a superior statute.

States having the least desirable long-arm statutes, for the purposes of marital situations, include New York,[37] Massachusetts,[38] and Michigan.[39] These are general long-arm statutes which allow personal jurisdiction in certain specified circumstances such as "transacting any business in the state." The primary difficulty with such a clause being utilized in divorce actions is the overtone of commercial necessity. Accordingly, courts faced with the problem have taken the position that the phrase "transacting any business" does not relate to personal affairs.[40] This does not seem unreasonable on the court's part, since more inclusive drafting could have readily revealed specific legislative intent to reach marital situations.

Illinois[41] and Idaho[42] have been more inclusive, specifying that "maintenance of a matrimonial domicile" may give rise to personal jurisdiction, thus expressing what contacts are necessary before personal jurisdiction will be extended. However, a second ground for this jurisdiction is wisely included by Illinois, but not by Idaho. This provision allows personal jurisdiction to be obtained if either a matrimonial domicile existed at the time the cause of action arose *or* there was a commission *within* the State of any act giving rise to the cause of action. Such a provision would provide a remedy for a situation where the matrimonial domicile never existed in the forum state. This might occur when a New York couple separates, the wife coming to reside in the forum while the husband moves to Nevada. However, should the husband subsequently commit an act in the wife's state which gives rise to a cause of action for divorce, the wife would be able to obtain personal jurisdiction over him.[43] This seems equitable. The forum state may have to

[36] IDAHO CODE ANN. § 5-514 (e) (Supp. 1969); ILL. REV. STAT. ch. 110, § 17 (1) (e) (1965); KAN. STAT. ANN. § 60-308 (b) (6) (1964); WIS. STAT. ANN. §§ 247.055 (lm) and 247.057 (1967).

[37] N.Y. CIV. PRAC. § 302 (3) (Supp. 1969-70).

[38] MASS. GEN. LAWS ch. 223A, § 3 (1958).

[39] MICH. COMP. LAWS ANN. §§ 600-705 (1968).

[40] *See, e. g.*, Willis v. Willis, 42 Misc. 473, 248 N.Y.S.2d 260 (1964), holding a separation agreement is not a transaction of business.

[41] ILL. REV. STAT. ch. 110, § 17 (1) (e) (1965).

[42] IDAHO CODE ANN. § 5-514 (e) (Supp. 1969).

[43] *See, e. g.*, Rosenblatt v. American Cyanamid Co., 16 N.Y.2d 621, 261 N.Y.S.2d

support the non-resident wife who will be unable to reach her husband unless this alternative clause were to be included. Hence the proposed subsection (1) will be more situationally flexible than those of all presently existing statutes with the exception of Illinois.

However, if the husband were never to enter the wife's state, the wife would be without a remedy,[44] since the courts would probably hold that a substantial connection with the plaintiff's state means connection with more of the marital res than the mere domicile of one party.[45] The provisions in the Kansas[46] and Wisconsin[47] statutes add weight to this prediction since both require the couple to have resided *together within* the state for a certain time in order to invoke personal jurisdiction (emphasis added).

The Kansas and Wisconsin statutes surpass others in allowing jurisdiction without requiring a wrongful act to have been committed within the state.[48] A provision similar to Wisconsin's requirement of a marital relationship within the state for six months out of the last six years would be recommended.[49] This assures liberal, but adequate, contacts to satisfy due process without denials of relief based on where or when a wrongful act may have occurred. Moreover, it gives a definite standard by which lawyers can confidently practice. However, a "wrongful act" alternative provision should also be included by the adopting state to provide relief in the situation discussed above, i.e. where the wife has been living in the forum state apart from her husband who, at some later time, enters the state and commits a wrongful act and thus submits to personal jurisdiction.

The proposed section does not, however, include the requirement that plaintiff, in order to invoke its jurisdiction, must *continue* to reside

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69, 209 N.E.2d 112 (1965), *appeal dismissed*, 382 U.S. 110 (1965); motion for a stay of judgment pending appeal denied. Justice Goldberg held, in chambers, that New York's long-arm statute, N.Y. CIV. PRAC. § 302 (McKinney 1966), could be utilized by a non-resident when New York had some legitimate interest in the matter; *see also*, Note, *In Personam Jurisdiction Expanded: Utah's Long-Arm Statute*, 1970 UTAH L. REV. 222, 245.

[44] This is inequitable, since a now-resident wife should be able to obtain personal jurisdiction over husband through at least one state. *See* note 34, *supra*, expressing general state policy to be access to the courts for "every person aggrieved."

[45] Friedman, *supra* note 11 at 55.

[46] KAN. STAT. ANN. § 60-308 (b) (6) (1964).

[47] WIS. STAT. ANN. §§ 247.055 (lm) and 247.057 (1967).

[48] *See, e. g.*, IDAHO CODE ANN. § 5-514 (e) (Supp. 1969) which requires the matrimonial domicile to exist within the state at the same time any act giving rise to the cause of action is committed.

[49] See proposed subsection (1), *supra*, note 8.

in the forum state after her spouse leaves, as do the Wisconsin[50] and Kansas[51] statutes. This is to insure the wife may still be able to seek relief although she may have been temporarily absent from the state after her husband departed. In this matter, much more discretion is left to the court to determine which state may have more "contacts or interest" in the wife. But, fortunately, at least the forum's court will not be *required* to deny relief, as are the Kansas and Wisconsin courts, in cases where the wife may have temporarily left her new state and then returned (perhaps even after having established a short residence in another state).

Perhaps due to oversight, Illinois[52] and Idaho[53] have failed to provide for personal jurisdiction in child support actions. A state considering such a draft should incorporate the Kansas provision.[54] There is little reason behind provision for the mother and neglect of the child. The state has an interest equally as large as the mother's well-being in the welfare of the child.

Another extremely important provision, found only in Wisconsin,[55] allows an action for support, alimony, or property division independent from a suit for divorce. In a situation where a non-resident husband has obtained an *ex parte* divorce, the ex-wife will be without a remedy in a state where either a marital relationship or an act giving rise to a cause of action for divorce must exist.

Traditionally, states have jealously guarded their territorial jurisdiction against encroachment by sister states, and with good reason. The proposed draft will not provide a state court with the opportunity to exceed its jurisdiction. Safeguards exist in number to prevent injustice.

An objection to extending personal jurisdiction in domestic relations cases is the dissimilarity between personal injury or contract cases and divorce actions. Jurisdiction over contract and tort judgments, the reason for most long-arm statutes, does not include the continuing liability for modification and change that alimony and support judgments usually reserve. Hence, some feel there is a different substantive due process requirement, since a husband could be tied to the courts of one state with the bonds of in personam jurisdiction for his lifetime and even after death through his estate.[56]

[50] WIS. STAT. ANN. §§ 247.055 (lm) and 247.057 (1967).

[51] KAN. STAT. ANN. § 60-308 (b) (6) (1964).

[52] ILL. REV. STAT. ch. 110, § 17 (1) (e) (1965).

[53] IDAHO CODE ANN. § 5-514 (e) (Supp. 1969).

[54] KAN. STAT. ANN. § 60-308 (b) (6) (1964) which specifically mentions alimony, child support, or property settlement.

[55] WIS. STAT. ANN. §§ 247.055 (lm) and 247.057 (1967).

[56] *See, e. g.*, Mizner v. Mizner, 439 P.2d 679, 683 (Nev. 1968) (dissenting opinion).

But this argument has been answered several times. In determining the amount of the alimony award, the interests of the nonappearing spouse receive substantial actual protection. For instance, in a modification suit, which is the basis of Justice Collins' criticism,[57] given the limited grounds for modification, i.e. the necessity for a showing of a change of circumstances and the requirement of actual notice to the obligor, it would not seem that due process owed the defendant could not easily be abridged.[58]

But even further protection is afforded defendant in view of the fact that the scope of the trial court's discretion includes, *inter alia*, consideration of availability and convenience to parties.[59] The doctrine of *forum non conveniens* provides the defendant with a device by which he can protect himself against a judicial exercise of personal jurisdiction when a serious question exists as to abrogation of his due process rights by the forum state's assumption of in personam jurisdiction.[60] Moreover, it is well known that every foreign state, when asked to grant full faith and credit to the judgment, may decide for itself the sufficiency of contacts with the forum state.[61]

The proposed section (entitled "Stay of proceeding to permit trial in a foreign forum") [62] provides for less drastic measures than the common law, which allowed only dismissal after the doctrine of *forum non conveniens* was invoked.[63] Hopefully the remedy will be applied more readily than under the common law.

It has been asserted by some commentators that the right of a non-resident defendant may be further protected by his utilization of Federal Court procedures.[64] This theory would include a non-resident defen-

[57] *Id.*

[58] *See, e. g.*, Robbins v. Robbins, 343 Mass. 247, 178 N.E.2d 281 (1961) requiring a substantial change in material circumstances to support modification subsequent to an original decree; Kase v. Kase, 18 N.J. Super. 12, 86 A.2d 587 (1952) declaring defendant was entitled to notice of a pending application for modification; see also Sanders v. Sanders, 125 So. 2d 916 (Fla. Dist. Ct. App. 1961) where the court held the master's recommendation of alimony and support was not supported by the evidence.

[59] Dillon v. Dillon, 46 Wis. 2d 659, 176 N.W.2d 362 (1970) upholding Wisconsin's marital long-arm statute.

[60] *Id.*; *see also* the Comment by the Judicial Council to CAL. CODE CIV. PROC. § 410.30 (Supp. 1969) at 97 indicating the section gives statutory recognition to the doctrine of *forum non conveniens*.

[61] *See, e. g.*, Williams v. North Carolina, 325 U.S. 226 (1945).

[62] *See* app. A *infra*; compare WIS. STAT. ANN. § 262.19 (1960), a unique and well-drafted "stay statute," with CAL. CODE CIV. PROC. § 410.30 (Supp. 1969).

[63] *See, e. g.*, Greyhound Corp. v. Rosart, 124 So. 2d 708 (Fla. Dist. Ct. App. 1960); Atchison, T. & S. F. Ry. v. Clark, 12 Ill. 2d 515, 147 N.E.2d 89, 93 (1958).

[64] Note, *Enlightened Forum Non Conveniens Policy, A Remedy for Plaintiff's Jurisdictional Overreaching*, 16 WAYNE L. REV. 1162, 1173-77 (1970).

dant who is sued in the plaintiff's forum under the provisions of the proposed section. In theory, he should be able to obtain a removal of the action to a federal district court under the provisions of 28 U.S.C.A. § 1441 (a) et seq., if he meets the statutory requirements. Once so removed to the federal courts, and upon a proper showing, a motion would lie under 28 U.S.C.A. § 1404 (a) (1964) for transfer of the action to a more convenient forum. Although this procedural protection has traditionally been considered available only to defendants reached by "conventional" long-arm statutes,[65] it has only recently been discussed and proposed as also being available to defendants sued under the now emerging "marital long-arm" statutes.[66] Unfortunately, the fallacy in this otherwise workable scheme, rendering it totally inapplicable for present purposes, is the long-enduring judicial doctrine of total federal court abstention from "domestic relations" cases.[67] This even includes refusal of jurisdiction to child custody cases[68] with the only exception allowed being a federal action to *collect* unpaid alimony under a *finalized* state decree.[69]

While the proposed statute permits the court to stay an action or any part of it, or dismiss it in whole or in part, a Federal court assuming subject matter jurisdiction is only permitted to transfer the action to another judicial district since dismissal runs the risk of plaintiff being denied his day in court.[70] This danger has been prevented by the conditions imposed on the defendant seeking dismissal under the proposed "stay" statute.[71] Such conditions, imposed for plaintiff's protection, include a provision which requires the defendant to stipulate to suit in the alternative forum. This provision is included to assure that his motion is made in good faith. It reserves to defendant only the right to make the contest in a forum which provides him with the fullest and fairest opportunity to present his case.

The defendant must also consent to waive the right to rely on any

[65] ALA. CODE tit. 7, § 199 (1) (1953 Cum Supp.); ARK. STAT. ANN. § 27-340 (1947); MD. ANN. CODE art. 23, § 88 (d) (1951); N.J. REV. STAT. § 34: 14-55.1 (1937); VT. STAT. ANN. § 1562 (1947).

[66] *See, e. g.*, IDAHO CODE ANN. § 5-514 (e) (Supp. 1969); ILL. REV. STAT. ch. 110, § 17 (1) (e) (1965); KAN. STAT. ANN. § 60-308 (b) (6) (1964); WIS. STAT. ANN. § 247.055 (lm) (1967).

[67] Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1958); Albanese v. Richter, 161 F.2d 688 (3d Cir. 1947), *cert. denied* 332 U.S. 782 (1947); *but see*, Vestal and Foster, *Implied Limitations on Diversity Jurisdiction of Federal Courts*, 41 MINN. L. REV. 1 (1956) for a persuasive criticism of these cases.

[68] Hernstadt v. Hernstadt, 373 F.2d 316 (2d Cir. 1967).

[69] *See, e. g.*, Morris v. Morris, 273 F.2d 678 (7th Cir. 1960).

[70] *See*, Note, *supra* note 64.

[71] See app. A *infra*.

statutes of limitation which may have run in the alternative forum. This is a desirable protection in the event the defendant's state's statutes of limitation are shorter than those in the wife's forum. If this provision were omitted, a stay or dismissal by the wife's state would automatically preclude her from seeking relief in the husband's forum; she would be without a remedy.[72]

In proposed subsection (1) a stay with retained jurisdiction is allowed, as opposed to automatic dismissal, as a predicate to suit in the alternative forum. This is included in an attempt to insure that the defendant will comply with the allegations in his motion for transfer. It protects the wife, although it assumes that she will bear the responsibility of bringing the action within the five-year stay period.

In short, the proposed "stay" statute is a desirable companion to the proposed "long-arm" statute. Together, the two statutes provide a practical and effective solution to a problem now plaguing nearly every state. The incorporation of the proposed sections into a *Uniform Act* applied by all states, could eliminate some of the motivation for husbands who flee a state's jurisdiction, and hence the statute might cease to operate extraterritorially.[73] However, this future advantage cannot surpass the benefits, possible at present, to the nation's wives and children who find themselves cut off from adequate means of support.

APPENDIX A

Proposed Bill

Stay of proceeding to permit trial in a foreign forum—

(1) Stay on initiative of parties. If a court of this state, on motion of any party, finds that trial of an action pending before it should as a matter of substantial justice be tried in a forum outside this state, the court may in conformity with sub. (3) enter an order to stay further proceedings on the action in this state. A moving party under this subsection must stipulate his consent to suit in the alternative forum and waive his right to rely on statutes of limitation which may have run in the alternative forum after commencement of the action in this state. A stay order may be granted although the action could not have been

[72] Compare Wisconsin's unique and well-drafted "stay" statute, Wis. Stat. Ann. § 262.19 (1960), *with* Cal. Code Civ. Proc. § 410.30 (Supp. 1969) which lacks any protective provisions.

[73] A wife holding a personal judgment against her husband may still be forced to seek execution in the husband's state of residence, but she will also be able to take more effective advantage of the Uniform Reciprocal Enforcement of Support Act, *e. g.*, Fla. Stat. § 88 (1969).

commenced in the alternative forum without consent of the moving party.

(2) Time for filing and hearing motion. The motion to stay the proceedings shall be filed prior to or with the answer unless the motion is to stay proceedings on a cause raised by counterclaim, in which instance the motion shall be filed prior to or with the reply. The issues raised by this motion shall be tried to the court in advance of any issue going to the merits of the action and shall be joined with objections, if any, raised by demurrer. The court shall find separately on each issue so tried and these findings shall be set forth in a single order which is appealable.

(3) Scope of trial court discretion on motion to stay proceedings. The decision on any timely motion to stay proceedings pursuant to sub. (1) is within the discretion of the court in which the action is pending. In the exercise of that discretion the court may appropriately consider such factors as:

(a) Amenability to personal jurisdiction in this state and in any alternative forum of the parties to the action;

(b) Convenience to the parties and witnesses of trial in this state and in any alternative forum;

(c) Differences in conflict of law rules applicable in this state and in any alternative forum; or

(d) Any other factors having substantial bearing upon the selection of a convenient, reasonable and fair place of trial.

(4) Subsequent modification of order to stay proceedings. Jurisdiction of the court continues over the parties to a proceeding in which a stay has been ordered under this section until a period of 5 years has elapsed since the last order affecting the stay was entered in the court. At any time during which jurisdiction of the court continues over the parties to the proceedings, the court may, on motion and notice to the parties, subsequently modify the stay order and take any further action in the proceeding as the interests of justice require. When jurisdiction of the court over the parties and the proceeding terminates by reason of the lapse of 5 years following the last court order in the action, the clerk of the court in which the stay was granted shall without notice enter an order dismissing the action.[74]

[74] *See* note 8, *supra*, for proposed long-arm section.

STUDENT COMMENTS

PROFESSIONAL ASSOCIATIONS IN MISSISSIPPI

I. Introduction

The "Mississippi Professional Corporation Act" was passed by the Mississippi legislature in 1968.[1] As originally passed, the Act expressly excluded the incorporation of attorneys at law, physicians and surgeons. An amendment effective March 17, 1970, however, included these professions in the Act.[2] In view of this act and the fact that a number of federal courts have upheld professional associations or corporations against attack by the Internal Revenue Service,[3] many Mississippi professional men are becoming interested in this form of operation. Under the association form, professionals may enjoy a wide variety of benefits available to corporations which are not generally available to the partnership or the individual. Among the benefits are tax favored retirement and profit-sharing plans. The potential for deferral of tax liability in these plans is the primary incentive for professionals with high incomes to incorporate. There are also a number of non-tax advantages available to professional corporations. This Comment will: (1) discuss briefly the historical development of professional associations; (2) illustrate the tax and non-tax advantages of these organizations; and (3) discuss problems which might arise with the Internal Revenue Service.

II. Recognition of Professional Corporations

In 1954 the Ninth Circuit Court of Appeals in *United States v. Kintner*,[4] held that an unincorporated group of Montana doctors was an "association" taxable as a corporation. The member doctors had sought deductions for a pension plan and other benefits not otherwise available to partnerships or individuals. This was one of the first attempts to have an unincorporated association taxed as a corporation. The Internal Revenue Service contended that the association should be treated as a partnership for tax purposes because the practice of medicine was personal and could not be engaged in by a corporation under state law, and that the association more nearly resembled a partnership than

[1] Miss. Code Ann. §§ 5390-41 to -57 (Supp. 1968).

[2] House Bill No. 48, Regular Legislative Session, 1970 (Advance Sheet, General Acts No. 2, at 12), *amending* Miss. Code Ann. §§ 5390-42, -43 (Supp. 1968), and *repealing* § 5390-54 (Supp. 1968).

[3] *See* cases cited note 14 *infra*.

[4] 216 F.2d 418 (9th Cir. 1954).

a corporation. The court rejected these arguments and held that an unincorporated association which more nearly resembles a corporation than a partnership would be treated as a corporation for tax purposes.[5]

The Internal Revenue Service announced that it would not follow the *Kintner* ruling.[6] In 1960 the Service promulgated regulations, commonly known as the "Kintner Regulations," which established guidelines in determining whether the professional relationship was to be classified as a partnership or corporation.[7] The regulations listed characteristics to be considered in the determination of corporate status: (1) continuity of life; (2) centralization of management; (3) limited liability; and (4) free transferability of interests.[8] The Kintner Regulations stated that state law would control in determining the classification of an organization.[9] This restriction made it virtually impossible for professional groups to meet the tests for incorporation since few states had enacted legislation allowing professionals to incorporate.[10]

Following the Kintner Regulations, many states enacted professional association acts which allowed the associations to be taxed as corporations if the regulations were followed.[11] In an attempt to nullify these professional corporations statutes, the Treasury in 1965 amended the Kintner Regulations.[12] These newer and more stringent regulations again made it practically impossible for a professional association to qualify as a corporation, even in view of state enabling legislation.[13]

Several courts have held the amended regulations to be invalid.[14]

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[5] *Id.* at 424; *see* Hanson, *Professional Corporations,* 59 ILL. B.J. 196 (1970); Smith and Namack *Professional Corporations Come of Age,* 43 FLA. B.J. 1311, 1312 (1969); Comment, *Texas Professional Associations,* 24 SW. L.J. 339, 341 (1970).

[6] Rev. Rul. 56-23, 1956-1 Cum. Bull. 598; *see* Note, *Florida Professional Associations and Subchapter S,* 22 U. FLA. L. REV. 609, 611 (1970).

[7] Treas. Reg. §§ 301.7701-1 to -4, T.D. 6503, 1960-2 CUM. BULL. 409.

[8] *Id.* § 301.7701-2 (a) (1).

[9] *Id.* § 301.7701-1 (c).

[10] Hanson, *supra* note 5, at 196.

[11] *Id.*; *see also* Comment, *Can Professionals Incorporate for Tax Purposes?,* 33 ALBANY L. REV. 311, 321 (1969).

[12] Treas. Reg. 301.7701-2 (h), T.D. 6797, 1965-1 CUM. BULL. 553.

[13] The new regulations denied corporate status to an association if it was "subject to local regulatory rules which deprive such corporation of the usual characteristics of an ordinary business corporation." *Id.* Since most professions are subject to state regulation, the IRS could contend that they could not carry on relationships essential to corporate status; *see* Comment, *Texas Professional Associations, supra* note 5, at 343.

[14] Smith v. United States, 301 F. Supp. 1016 (S.D. Fla. 1969); Cochran v. United States, 299 F. Supp. 1113 (D. Ariz. 1969); Wallace v. United States, 294 F. Supp. 1225 (E.D. Ark. 1968); Holder v. United States, 289 F. Supp. 160 (N.D. Ga. 1968), *aff'd* 412 F.2d 1189 (5th Cir. 1969); Kurzner v. United States, 286 F. Supp. 839 (S.D. Fla.

The courts ruled that the new regulations were arbitrary and discriminatory toward professional corporations, and that there was no rational ground for distinguishing professional service organizations from non-professional service organizations.[15] One court stated: "There is no reason, in either policy or fact for different tax treatment of various kinds of personal service corporations. The preclusion of professional service corporations from corporate status is wholly arbitrary and discriminatory and, therefore, cannot and will not be countenanced by this court."[16]

After these taxpayer victories, the Internal Revenue Service conceded that most professional associations organized under state law would be treated as corporations for tax purposes.[17] The following are excerpts from the release of August 6, 1969:

> The Internal Revenue Service announced, in response to recent decisions of the federal courts, that it is conceding that organizations of doctors, lawyers, and other professional people organized under state professional association acts will, generally, be treated as corporations for tax purposes.
>
> This action followed a decision not to apply to the Supreme Court for certiorari in the recent case of United States v. O'Neill, 410 F.2d 888 (6th Cir., May 1, 1969), aff'g 281 F. Supp. 359 (N.D. Ohio 1968), and Kurzner v. United States, 413 F.2d 97 (5th Cir. May 27, 1969) aff'g 286 F. Supp. 839 (S.D. Fla. 1968).[18]

Revenue Ruling 70-101 was issued in March, 1970 pursuant to the above release.[19]

As of December, 1970, every state, with the exception of Wyoming and the District of Columbia, had enacted legislation allowing all or certain of the professions to incorporate.[20] With this trend, and the favorable court cases and rulings, it is highly unlikely that a professional

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1968), *aff'd* 413 F.2d 97 (5th Cir. 1969); O'Neill v. United States, 281 F. Supp. 359 (N.D. Ohio 1968), *aff'd* 410 F.2d 888 (6th Cir. 1969); Empey v. United States, 272 F. Supp. 851 (D. Colo. 1967), *aff'd* 406 F.2d 157 (10th Cir. 1969).

[15] *See, e.g.*, United States v. Empey, 406 F.2d 157, 170 (10th Cir. 1969); O'Neill v. United States, 281 F. Supp. at 364.

[16] Kurzner v. United States, 413 F.2d at 111.

[17] Technical Information Release No. 1019 (Aug. 6, 1969); *see* 1 P-H CORP. ¶ 1205, n.1 (1971).

[18] *Id.*

[19] The ruling covered the professional corporation statutes of 47 states. Of these, 43 were unqualifiedly approved, including the Mississippi statute. The statutes of Tennessee, Illinois, Pennsylvania, and Texas were only partially approved. *See* Eliasberg, *Setting Up the Professional Corporation*, P-H TAX IDEAS ¶ 15,025, at 15,652 (1970) [hereinafter cited as TAX IDEAS].

[20] 1 P-H CORP. ¶ 1205 (1971).

association organized under the Mississippi act will have to litigate its tax status.

III. Advantages of Corporate Taxation

A primary concern of the successful professional man is establishing an investment program which will provide adequate funds for his retirement or for his family should he die before retirement. However, the progressive tax rates applicable to the high income of a successful professional limit the advisability of establishing such programs. For example, a successful unincorporated professional man in the fifty per cent income tax bracket must earn $2 to be able to set aside $1 for an investment program. If his investments yield ordinary income, these earnings are cut in half because the income is added to his income from other sources and is again taxed at fifty per cent. For these reasons, professionals in high income tax brackets have attempted to find tax sheltered investment and retirement programs.[21]

The formation of a partnership does not solve the problem. A partnership is not an entity separate from the owners for tax purposes; each partner is taxed at the same progressive rates on his share of the business income even if the income is not distributed to him.[22] In contrast, a corporation is treated as an independent taxpaying entity separate from its shareholders.[23] The shareholders are taxed only on the income they receive from the corporation in the form of dividends or salaries.[24]

The tax advantages of a corporation are readily apparent. A professional who is an employee of a corporation can leave part of his income in the corporation to be taxed at the probably lower corporate tax rate.[25] In addition, a corporation's stock bonuses, profit-sharing, pension, trust and annuity plans for employees provided by section 401 of the Internal Revenue Code should be of great interest to professionals. The corporation's payments to these plans are deductible.[26] The benefits that the employee receives from the plans are not taxed until they are actually realized by the employee.[27] Businessmen, operating in the corporate form, have long enjoyed such favorable tax treatment; profes-

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[21] *See* Smith and Namack, *supra* note 5, at 1313.

[22] Int. Rev. Code of 1954, §§ 701, 702.

[23] B. Bittker & J. Eustis, Federal Income Taxation of Corporations and Shareholders § 1.05, at 13 (2d ed. 1966).

[24] *Id.*

[25] Int. Rev. Code of 1954, § 11; *see* note 55 *infra* and accompanying text.

[26] Int. Rev. Code of 1954, § 404.

[27] Treas. Reg. § 1.402 (a) -1 (a) (1) (i) (1956).

sionals, however, who are self-employed or members of partnerships have been denied these benefits.[28]

In 1952, Congress enacted a plan for self-employed persons, the Self-Employed Individual Tax Retirement Act,[29] also called the "Keogh" or "HR-10" plan. Unfortunately, it does not offer many of the benefits of the corporate plans. The professional man operating under the Keogh plan is limited to a deduction of ten per cent of earned income or $2,500, whichever is less.[30] This is a severe limitation compared to the large amounts which may be set aside under the corporate plans.[31] Another disadvantage is that all full-time employees for the preceding three years must be covered under the Keogh plan.[32] Under a corporate plan certain employees can be omitted.[33] Also the estate tax benefits for those under the corporate plans[34] are not available under the Keogh plan.[35]

A. Qualified Deferred Compensation

Qualified deferred compensation plans offer the professional significant tax-sheltered investment opportunities. There are two basic types of plans—pension and profit-sharing. In a professional corporation, the amounts contributed to a qualified pension or profit-sharing plan are not currently taxable to the professional man for whose benefit they are set aside. These amounts are deductible by the corporation.[36] In contrast, a professional man without a qualified corporate plan or a Keogh plan is not permitted to deduct amounts set aside for retirement.[37]

A pension plan is primarily established to provide payment of benefits to participants after retirement. These retirement benefits are generally determined by such considerations as years of service and compensation received.[38] There is no limit on amounts which may be contributed to a pension plan; however, the contributions must be determined ac-

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[28] Smith and Namack, *supra* note 5, at 1313.

[29] Self-Employed Individuals Retirement Act of 1962, Pub. L. No. 87-792, 76 Stat. 809 (1962). The act has been codified in the following sections of the INT. REV. CODE of 1954: §§ 72 (n), 401 (a), 401 (c) - (g), 404 (a), 404 (c), 404 (e), 404 (f), 405, 503 (g).

[30] INT. REV. CODE of 1954, § 404 (e) (1).

[31] *See* notes 44 and 45 *infra* and accompanying text.

[32] INT. REV. CODE of 1954, § 401 (d) (3).

[33] *See* note 50 *infra* and accompanying text.

[34] *See* notes 63-65 *infra* and accompanying text.

[35] Treas. Reg. § 20.2039-2 (c) (i); *see* Hanson, *supra* note 5 at 202, n.36.

[36] INT. REV. CODE of 1954, § 404.

[37] Smith and Namack, *supra* note 5, at 1314.

[38] Treas. Reg. 1.401-1 (b) (1) (i) (1956).

tuarially on the basis of definitely determinable benefits.[39] Participants generally will receive a fixed pension commonly funded by a trust.[40] Older professionals who become participants at an advanced age are more likely to favor a pension plan.[41]

A profit-sharing plan is designed to give participants a feeling of involvement in the success of the venture. The benefits are usually more varied than those of the pension plan and do not depend exclusively on retirement. The profit-sharing plan requires corporate contributions only when there are profits.[42] This plan favors participants who are the youngest at the inception of the plan because their accounts will accumulate for longer periods of time.[43] The money is usually left in a trust to realize maximum benefits. An amount equal to fifteen per cent of the salary paid to a professional may be set aside tax free under this plan.[44]

If the association has a combination pension and profit-sharing plan, an amount equal to twenty-five per cent of a professional's salary may be set aside tax free by the association.[45] If contribution carryovers are involved, a maximum of thirty per cent may be allowed.[46]

The benefits under qualified deferred compensation plans must not favor officers, shareholders, or supervisory employees.[47] They must be provided on a "nondiscriminatory" basis. Therefore employees (e.g. secretaries, nurses, etc.) must be included in the plan.[48] This could prove costly. There are ways to minimize this cost through the use of eligibility periods, vesting requirements, and integration of the plan with Social Security.[49] A plan can exclude part-time employees, those with short services, those with certain job designations, or any other reasonable basis which does not discriminate in favor of highly paid stockholder-employees.[50] The association is also permitted to defer vesting over a reasonable period of time.[51] For example, participants might not be

[39] *Id.*

[40] Note, *Florida Professional Association and Subchapter S*, 22 U. FLA. L. REV. 609, 612 (1970).

[41] TAX IDEAS, *supra* note 19, ¶ 15,025.4.

[42] *Id.*

[43] Note, *supra* note 40, at 613.

[44] INT. REV. CODE of 1954, § 404 (a) (3).

[45] *Id.* § 404 (a) (7).

[46] *Id.* The contribution carryovers are the excess contributions for one taxable year which may be carried over and are deductible in the succeeding taxable years of the association, subject to certain limitations detailed in Treas. Reg. § 1.404 (a)-7 (1956).

[47] INT. REV. CODE of 1954, § 401 (a) (4).

[48] TAX IDEAS, *supra* note 19, ¶ 15,025.4.

[49] Treas. Reg. § 1.401-3 (e); *see* TAX IDEAS, *supra* note 19, ¶ 15,025.4.

[50] INT. REV. CODE of 1954, § 401 (a) (3) (B); Treas. Reg. § 1.401-3 (d) (1956).

[51] Treas. Reg. § 1.401-3 (d) (1956).

allowed to take with them amounts placed in the fund for their benefit until their fifteenth year of employment. Under the Keogh plan, all participants have full and immediate vesting.[52]

B. Investments

In addition to the deductions set forth above, the income earned by the money set aside under the pension or profit-sharing plan accumulates tax free.[53] In contrast, if the professional man with no tax-sheltered plan receives income from his investments, this amount constitutes earned income and is fully taxable to him at the time of receipt.[54] This ability to accumulate earnings tax free is a tremendous advantage in operating in the corporate form. The doctor or lawyer who is not well versed in financial matters, or who does not have the time, can delegate the investment decisions to a competent corporate trustee.

C. Corporate Income

It is not essential that all corporate earnings be distributed. There is a temptation to retain income in the corporation in view of the lower rates at which the corporation will be taxed in most cases. Corporate income is taxed at the rate of twenty-two per cent up to $25,000 and forty-eight per cent in excess of $25,000.[55] There is no comparable advantage in a partnership; each partner is taxed on his share of the business income even if this income is not distributed to him.[56]

Up to $100,000 may be accumulated by the association for any reason.[57] Income in excess of that amount is subject to a penalty tax as excess accumulated earnings.[58] However, there is no penalty tax if the association can show that the accumulation is for the "reasonable needs of the business."[59] It would appear that an accumulation for the construction of a new building or clinic, or to purchase new equipment should fall within the "reasonable needs of the business."[60]

D. Distributions

Distributions from corporate pension and profit-sharing plans generally are afforded favorable tax treatment. If the distributions take the

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[52] Treas. Reg. § 1.401-12 (g) (1963).

[53] INT. REV. CODE of 1954, §§ 401 (a), 501 (a).

[54] Smith and Namack, *Professional Corporations Come of Age*, 43 FLA. B.J. 1311, 1314 (1969).

[55] INT. REV. CODE of 1954, § 11.

[56] *Id.* §§ 701, 702.

[57] *Id.* § 535 (c).

[58] *Id.* § 531.

[59] *Id.* § 533.

[60] TAX IDEAS, *supra* note 19, ¶ 15,025.9 (3).

form of annuity payments, they will be taxed as ordinary income.[61] However, the payments will usually be made to the distributee at a time when he has passed his peak earning years and in a lower tax bracket. If a participant receives the distribution from a pension or profit-sharing plan in one lump sum, this amount is eligible for a special seven-year averaging which lessens the tax burden.[62]

If a professional member should die prior to retirement, the first $5,000 received by his beneficiaries is totally tax free.[63] Amounts received in excess of $5,000 must be included in the gross income of the beneficiaries for income tax purposes.[64] All distributions received by his family under a corporate pension or profit-sharing plan are excluded from his gross estate for federal estate tax purposes.[65] No gift tax will be assessed to the professional on his selection of the beneficiaries to receive his plan benefits.[66] The estate tax exclusion is not available to a self-employed professional man under the Keogh plan.[67] All retirement amounts held by a professional man without any plan would be included in his estate at the time of his death.[68]

E. Corporate Fringe Benefits

There are also a number of fringe benefits available to corporations which are not generally available to partnerships.

Tax Free Group Life Insurance. Up to $50,000 of group life insurance may be provided by the corporation to its employees as a business expense without income tax consequences.[69] Such coverage may be provided by a partnership for its employees, but if the coverage is extended to partners, the premiums must be included in their personal income for tax purposes.[70]

Accident and Health Insurance. A corporation may deduct the full cost of premiums on accident and health insurance for its employees without

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[61] Treas. Reg. § 1.61-11 (a) (1957).

[62] INT. REV. CODE of 1954, §§ 402 (a), 403 (a) (2), 72 (n). Prior to the 1969 Tax Reform Act, lump sum distributions were taxed at long-term capital gain rates. Under section 515 of the act, such distributions no longer qualify for capital gains treatment after 1969. *See* D. FIORE & P. KLEIN, ANALYSIS OF THE TAX REFORM ACT OF 1969, at 68 (1970).

[63] INT. REV. CODE of 1954, § 101 (b).

[64] *Id.*

[65] *Id.* § 2039 (c).

[66] *Id.* § 2517.

[67] Treas. Reg. § 20.2039-2 (c) (i); *see* Hanson, *supra* note 5, at 202, n.36.

[68] INT. REV. CODE of 1954, § 2033.

[69] *Id.* § 79.

[70] Hanson, *Professional Corporations*, 59 ILL. B.J. 196, 197 (1970).

increasing the employee's taxable income.[71] One practicing his profession as an individual or in a partnership is permitted to deduct only one-half of such premiums up to $150 since he is not an employee.[72] *Sick Pay Exemption.* A corporate employee may exclude from his taxable income up to $100 per week under salary continuation plans while he is absent from work due to personal injuries or sickness.[73] If a non-incorporated professional person receives income during a period of disability, he is taxed as he is at other times.[74]

F. Fiscal Year Option

A partnership is required to have the same taxable year as the partners, which will normally be a calendar year ending on December 31.[75] A corporation may elect, at the time of its incorporation, a fiscal year, which can end on the last day of any month other than December.[76] Careful planning with respect to the fiscal year may result in deferring tax on income to a later year. Income of the last months of a calendar year are commonly "rolled over" in the succeeding calendar year and after several years this income can pose quite a problem. With the inception of a fiscal year, this "rolled over" income can be taxed at lower rates in the short taxable period between December 31 of the last calendar year and the beginning date of the fiscal year. This can amount to considerable tax savings during the first year of the fiscal year's existence.[77]

G. Subchapter S

Sections 1371-79 of the Internal Revenue Code allow a professional corporation to be treated as a partnership for tax purposes. The Subchapter S election allows all of the corporation income to be taxed to the shareholders of the corporation, thus eliminating a tax on corporate income.[78] This, in effect, does away with the disadvantage of double taxation—the tax on corporate income and the personal income tax imposed on the individual who must include the dividends paid out of corporate income in his gross income.[79] Also, the possibility of an accumulated earnings tax under section 531 and a personal holding company tax under section 541 are eliminated.[80] A corporation must meet

[71] INT. REV. CODE of 1954, §§ 105 (b), 106.

[72] *Id.* § 213 (a).

[73] *Id.* § 105 (d).

[74] Hanson, *supra* note 70, at 198.

[75] Treas. Reg. § 1.442-1 (b) (2) (1957); INT. REV. CODE of 1954, § 441 (d).

[76] INT. REV. CODE of 1954, §§ 441 (e), 441 (f).

[77] *See* Hanson, *supra* note 70, at 199.

[78] INT. REV. CODE of 1954, § 1372.

[79] *Id.* § 61 (a) (7).

[80] *Id. See* Note, *Florida Professional Associations and Subchapter S*, 22 U. FLA. L. REV. 609, 620 (1970).

four basic requirements in order to elect under Subchapter S: there must be no more than ten shareholders; only individuals or estates may be shareholders; nonresident alien shareholders are prohibited; and only one class of stock is allowed.[81] In addition, the consent of all shareholders is required for a valid election.[82]

There is one serious disadvantage in applying for Subchapter S treatment. This is with respect to pension and profit-sharing plans. Section 1379, recently enacted as part of the Tax Reform Act of 1969,[83] limits contributions made by a Subchapter S corporation under a qualified plan for the benefit of a stockholder-employee to an amount equal to ten per cent of his compensation or $2500, whichever is less.[84] Any contributions made by the corporation in excess of that amount must be included in the stockholder-employee's gross income.[85] This provision brings the Subchapter S professional corporation in line with the same limitations imposed under the Keogh plan.[86] Employees or stockholders who own five per cent or less of the stock are not subject to the Subchapter S limitation.[87]

Strong consideration should be given to the impact of section 1379 before electing to go under Subchapter S. However, despite the restriction on pension and profit-sharing plans, elimination of the corporate tax and other tax benefits may still make the Subchapter S election desirable, especially for professionals with lower incomes.

H. Computation of Benefits

A comparison of the tax status of a professional who is a member of an association with that of a professional who is self-employed, or a member of a partnership will illustrate the potential tax savings available. Table A and Table B illustrate the tax savings possible in one year after the formation of a professional corporation.[88]

Table A compares the tax treatment of a non-corporate professional

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[81] INT. REV. CODE of 1954, § 1371.

[82] *Id.* § 1372(a).

[83] Pub. L. No. 91-172, § 531, 83 Stat. 654 (1969); *see* Note, *supra* note 80, at 619.

[84] INT. REV. CODE of 1954, § 1379(b)(1).

[85] *Id.*

[86] *See* note 29 *supra* and accompanying text.

[87] INT. REV. CODE of 1954, § 1379(d).

[88] The computations in Tables A and B are based on an example in Boughner, *Mechanics of Organizing a Law Firm as an Association*, 57 ILL. B.J. 800, 807 (1969). The income tax is computed at 1970 joint return rates. It is assumed that taxable income other than professional income is offset by itemized deductions and personal exemptions of the professional man. For a more complete table of comparison see Smith and Namack, *Professional Corporations Come of Age*, 43 FLA. B.J. 1311, 1317 (1969).

man with earnings of $100,000 a year who invests or sets aside $24,000 of this amount for retirement with an employee of a professional corporation who sets aside the same amount tax free.

One of the main differences in the tax treatment of the two individuals is that the $24,000 is a non-deductible investment for the non-corporate professional,[89] whereas the $24,000 which the corporate professional sets aside is not counted in his income. The $19,000 put aside in the corporate plan is an amount equal to twenty-five per cent of the professional's salary of $76,000. This is the maximum amount allowed under a combination pension and profit-sharing plan.[90] The $5,000 which is left in the corporation is the balance of the $100,000 to which the corporate professional would normally be entitled. This amount would not be a part of the profit-sharing and pension plan and would constitute earned income to the corporation. This amount might be distributed as dividends or left in the corporation. The tax rate on this income would be twenty-two per cent if the taxable income of the corporation is $25,000 or less.[91] If the corporation's income amounted to more than $25,000, the tax rate would be forty-eight per cent;[92] however, a professional corporation could prevent its income from exceeding $25,000.

It can be seen from the table that the $76,000 salary of the corporate employee places that individual in a much lower tax bracket than the $100,000 income of the non-corporate professional. This fact, together with the $24,000 which must be deducted from the non-corporate professional's income, leaves that individual with a $30,820 net income, while the corporate professional's net income is $44,980.

Table A

	Non-Tax-Sheltered Plan	Corporate Combination Pension and Profit-Sharing Plan (25%)
ANNUAL CONTRIBUTIONS		
Amount deductible for professional	$ ———	$ 19,000
Amount left in corporation by professional	———	5,000
Nondeductible investments	24,000	———
Total annual contributions	$ 24,000	$ 24,000

[89] *See* note 37 *supra* and accompaning text.
[90] *See* note 45 *supra* and accompanying text.
[91] *See* note 55 *supra* and accompanying text.
[92] *Id.*

NET INCOME FROM PROFESSION		
Income	$100,000	$ 76,000
Less income tax	45,180	31,020
Net income before non-deductible investments	54,820	44,980
Less nondeductible investments	24,000	———
Net income from profession	$ 30,820	$ 44,980
TOTAL TAXES PAID		
Income tax	$ 45,180	$ 31,020
Corporate tax	———	1,100
Total taxes paid	$ 45,180	$ 32,120

Table B

	Non-Tax-Sheltered Plan	Corporate Combination Pension and Profit-Sharing Plan (15%)
ANNUAL CONTRIBUTIONS		
Amount deductible for professional	$ ———	$ 4,500
Amount left in corporation by professional	———	500
Nondeductible investments	5,000	———
Total annual contributions	$ 5,000	$ 5,000
NET INCOME FROM PROFESSION		
Income	$ 30,000	$ 25,000
Less income tax	7,880	6,020
Net income before non-deductible investments	22,120	18,980
Less non-deductible investments	5,000	———
Net income from profession	$ 17,120	$ 18,980
TOTAL TAXES PAID		
Income tax	$ 7,880	$ 6,020
Corporate tax		110
Total taxes paid	$ 7,880	$ 6,130

The same computations are made in Table B for a professional who earns $30,000 a year. The only difference is that an amount equal to fifteen per cent of the professional's salary is placed in the corporate plan instead of twenty-five per cent. A professional earning $30,000 a year probably could not afford to have twenty-five per cent of his income put away for investments. From Table B one can see that the tax savings afforded a professional earning $30,000 a year are not as great as

one earning $100,000 a year. Obviously the higher the professional's income, the greater the economic benefits to be derived from the adoption of a profit-sharing or pension plan. There is no set rule as to how much a professional's income should be before incorporation is "economically practical." One authority maintains that "the benefits of the professional corporation . . . produce more significant results to taxpayers whose combined (Federal and State) tax bracket is 50% or more."[93] Another writer states that the best prospects are those professionals "who are netting more than $30,000 from their practice"[94] (39% tax rate for joint returns).

Each professional firm must consider its own financial situation in determining whether to incorporate. For the professional in the lower income tax bracket, the Keogh plan with a maximum deduction of $2500 might be sufficient for investment plans.[95] The additional advantages of a professional association such as limited liability and easy transferability of interest might still warrant incorporation.

IV. Non-Tax Advantages

In addition to the advantages of corporate taxation, there are also a number of non-tax reasons for the incorporation of a professional firm.

A. Personal Liability

Personal liability should be a consideration where two or more professionals practice together. In a partnership each partner is jointly and severally liable for the acts of the other partners.[96] The Mississippi Professional Corporation Act makes the professional shareholder personally liable for only those wrongful or negligent acts committed by him or by any person under his direct supervision.[97] A professional shareholder is not liable individually for the acts of the other professionals in the association. The Mississippi act also states that the corporation "shall be liable to the full extent of its property for any negligent or wrongful acts or misconduct committed by any of its officers, shareholders,

[93] Tax Ideas, *supra* note 19, ¶ 15,025.6.

[94] Poole, *Professional Corporations—The 1970 Bonanza*, 109 Trust & Estates 760, 761 (1970).

[95] *See* note 29 *supra* and accompanying text.

[96] *See, e.g.*, Shemper v. Hancock Bank, 206 Miss. 775, 40 So. 2d 742 (1949); Wise v. Cobb, 135 Miss. 673, 100 So. 189 (1924); Dinwiddie v. Glass, 111 Miss. 449, 71 So. 745 (1916).

[97] Miss. Code Ann. § 5390-46 (Supp. 1968) states:

> Any officer, shareholder, agent or employee of a corporation organized under this act shall remain personally and fully liable and accountable for any negligent or wrongful acts or misconduct committed by him, or by any person under his direct supervision and control, while rendering professional services on behalf of the corporation to the person for whom such professional services were being rendered. *Id.*

agents or employees while they are engaged on behalf of the corporation in the rendering of professional services."[98] This clause still would not apply to a professional member's personal assets in the corporation in the form of equipment, stock or money.

B. Scope of Activities

A professional association in Mississippi may only be formed for the purpose of rendering a professional service.[99] In addition, its shareholders must be duly licensed or otherwise legally authorized to render the same professional service.[100] The Act allows the shareholders, however, to engage in related types of professional services.[101] It prohibits consolidation or merger with any other corporation except with one organized under the professional corporation act and which renders the same or related professional services.[102]

Although the Act does prohibit the association from engaging in unrelated activities, the association is given wide latitude in investing its funds. The Act states:

> [N]othing in this act or in any other provision of existing law applicable to corporations shall be interpreted to prohibit such corporation from investing its funds in real estate, mortgages, stocks, bonds, or any other type of investments, or from owning real or personal property necessary for the rendering of professional services.[103]

Under this provision associations may purchase land, build office buildings and clinics, rent extra office space, purchase equipment, etc.

C. Transferability of Shares

The Mississippi act provides that a professional association may only issue its stock to persons who are licensed to provide the same professional service that the asociation is authorized to provide.[104] Once a person becomes a shareholder, he may transfer his shares only to an individual who is also licensed to provide the same professional service.[105] This transferability to another licensed individual is an advantage, rather than a restriction, that should not be overlooked. It provides an easier way for a new partner to come into the association than the partnership arrangement which requires a new partnership agreement to be drawn. In

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[98] *Id.*
[99] MISS. CODE ANN. § 5390-47 (Supp. 1968).
[100] *Id.* § 5390-43.
[101] *Id.*
[102] *Id.* § 5390-53.
[103] *Id.* § 5390-47.
[104] *Id.* § 5390-48.
[105] *Id.* § 5390-50.

addition, the involved procedures surrounding a partnership on the death of a partner are entirely eliminated.[106]

D. Selection of Name

The Mississippi act requires that the corporate name include the name of one or more of the shareholders and end with words which distinguish the professional corporation from other corporations.[107] The act requires the use of "Chartered" or "Limited" or the abbreviation "Ltd." or the words "Professional Association" or merely the abbreviation "P.A."

The above words will put the public on notice that it is dealing with a professional corporation and provide assurance that its shareholders are licensed professionals. In addition, the use of the words "Professional Association" or the abbreviation "P.A." should satisfy many professionals who would frown on adding "Inc." to their name.

V. Caveat—Operation of a Professional Association

The Internal Revenue Service in Technical Information Release 1019 conceded the right of professionals to incorporate,[108] but the language of the announcement made it clear that the Service was limiting its acceptance to factual situations similar to those in *United States v. O'Neill*[109] and *Kurzner v. United States*.[110] This is a warning that the Service will still carefully scrutinize the form and substance in each case to determine whether a professional corporation deserves corporate status for federal tax purposes.

Sections 269 and 482 of the Internal Revenue Code are potential weapons in the hands of the Service. These sections hang "menacingly over the professional's head."[111] They deal with the following questions: (1) for what purpose was the corporation formed? (2) who earned the income?

Section 269 states that if the principal purpose of the acquisition or control of a corporation is "evasion or avoidance of Federal income tax by securing the benefit of a deduction, credit, or other allowance

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[106] *See* Hanson, *Professional Corporations*, 59 Ill. B.J. 196, 200 (1970).

[107] Miss. Code Ann. § 5390-51 (Supp. 1968).

[108] *See* note 17 *supra* and accompanying text.

[109] 410 F.2d 888 (6th Cir. 1969).

[110] 413 F.2d 97 (5th Cir. 1969). Technical Information Release No. 1019, note 17 *supra*, stated:

> Both of these decisions held that a group of doctors organized under state law was classifiable as a corporation for Federal tax purposes. The government did, however, reserve the right to conclude differently in any case that reflects special circumstances not present in *O'Neill* or *Kurzner*.

[111] Tax Ideas, *supra* note 19, ¶ 15,025.9.

which such person or corporation would not otherwise enjoy,"[112] then such deduction or credit may be disallowed. The Internal Revenue Service might contend that the "principal purpose" of the establishment of a professional corporation is to secure corporate tax benefits not otherwise available to self-employed persons, such as qualified corporate pension and profit-sharing plans.[113]

Of course, the formation of many corporations is motivated by the same tax benefits that induce most professionals to incorporate. The tax advantages resulting from the formation of a corporation are apparent to anyone who is conscious of the high rates of federal income taxation. It has been stated that, "There is no principle of law that has been more clearly established than that a taxpayer may avail himself of all provisions established by the statutes for minimizing his taxes."[114]

The court in *Kurzner v. United States*[115] expressed in a footnote that "we intimate no view whatever as to the effect of section 269 of the Internal Revenue Code of 1954 in regard to professional service corporations."[116] The footnote further pointed out that "the desire for pension and profit-sharing plans is not purely a tax motive; insofar as the desire is for economically feasible retirement and work incentive plans, it is clearly a non-tax motive."[117]

Section 269 is probably not a serious argument against incorporating; however, to avoid any problems at all, the corporate minutes of a professional association should specifically state non-tax reasons for incorporating such as limited liability and centralized management.[118]

The next question is of greater significance: Did the professional corporation or the professional himself earn the income? The first principle of income taxation is that income must be taxed to the person who earns it.[119]

Section 482 permits the allocation of gross income among related organizations, where necessary to clearly reflect income or to prevent evasion of taxes.[120] Under this section the Service might contend that the income was earned by the professional man and not by the corpora-

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[112] INT. REV. CODE of 1954, § 269 (a).
[113] TAX IDEAS, *supra* note 19, ¶ 15,025.9.
[114] Van Zandt v. Commissioner, 341 F.2d 440, 441 (5th Cir. 1965).
[115] 413 F.2d 97 (5th Cir. 1969).
[116] *Id.* at 101, n.17.
[117] *Id.*
[118] TAX IDEAS, *supra* note 19, ¶ 15,025.9.
[119] *See, e.g.*, Old Colony Trust Co. v. Commissioner, 279 U.S. 716 (1929).
[120] INT. REV. CODE of 1954, § 482.

tion, and that the income and deductions should be allocated to the professional man and not to the corporation.[121]

Following corporate details and formalities is of utmost importance in relation to this problem. An illustration of the seriousness of this matter is the case of *Jerome J. Roubik*.[122] In *Jerome J. Roubik* the failure of a group of doctors to properly operate their corporation, cost them their coporate tax status. The doctors were treated as partners because the corporation existed in name only. The doctors continued their independent practices as if no corporation ever existed.

The *Roubik* case should not be considered an attack on professional corporations. It was an attack on a particular professional corporation which did not operate in a corporate manner. The attack would have been made whether or not the shareholders were professionals. To prevent such a situation professionals who incorporate should pay particular attention to the details of corporate life. A professional service organization must be both organized and operated as a corporation to be classified as such.[123]

The Internal Revenue Service could conceivably attempt to classify professional corporations as personal holding companies. In an attempt to prevent funds derived largely from personal service activities from being stored up in a corporation to be taxed at lower corporate rates, section 542 of the Internal Revenue Code imposes a seventy per cent penalty surtax on undistributed personal holding company income.[124] A professional association's product is "service." The association income could possibly be subject to this provision. However, the problem should be alleviated if all services are performed in the name of the corporation instead of the individual professional.[125]

VI. Conclusion

The professional association is not a panacea for all professional firms; however, the numerous advantages an association offers merit serious consideration. Among the principal benefits are the pension and profit-sharing plans which allow substantial savings over the present Keogh plan. Other significant benefits are limited liability for the professional activities of a shareholder's associates and the easy transferability of interests.

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[121] Smith and Namack, *Professional Corporations Come of Age*, 43 Fla. B.J. 1311, 1319 (1969). For an unsuccessful tax avoidance attempt, *see* Borge v. Commissioner, 405 F.2d 673 (2d Cir. 1968).

[122] 53 T.C. No. 36 (Dec. 3, 1969); *see* Tax Ideas, *supra* note 19, ¶ 15,025.9.

[123] Tax Ideas, *supra* note 19, ¶ 15,025.9.

[124] Int. Rev. Code of 1954, § 541.

[125] Smith and Namack, *supra* note 119, at 1319-20.

There are those who contend that operating in the corporate form interferes with the traditional attorney-client, doctor-patient, etc., relationships. They maintain that the personal nature of a profession is lost in a corporation. Two basic factors are changing such views. First, increased urbanization, forever expanding knowledge in professional fields, and an increasingly more complicated society are making a "pooling of talents not only desirable, but also necessary."[126] The size of medical, legal, accounting and other professional firms are continually increasing in size. There is a definite trend toward the larger practice and "as the organization becomes larger it tends to become unwieldy unless it is operated in a very business-like fashion."[127] The second reason is that professionals are beginning to realize that partnerships and individuals have long been discriminated against by the Internal Revenue Service in favor of corporations, and that the opportunity now exists to take advantage of the more favorable corporate tax laws.[128]

Before incorporating, a professional must consider all advantages and disadvantages. The additional costs and expenses involved in establishing and operating in the corporate form may not be commensurate with the economic benefits to be derived. For the professional in a high tax bracket,[129] the advantages of the corporate practice will far outweigh the disadvantages. He would be ill-advised not to seriously consider incorporating his practice.

James S. Armstrong

[126] TAX IDEAS, *supra* note 19, ¶ 15,025.1.

[127] Poole, *Professional Corporations—The 1970 Bonanza*, 109 TRUSTS & ESTATES 760, 761 (1970).

[128] TAX IDEAS, *supra* note 19, ¶ 15,025.1.

[129] *See* notes 93 and 94 *supra* and accompanying text.

THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

I. Introduction

The sixth amendment to the Constitution of the United States provides that "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense." Until *Powell v. Alabama*,[1] in 1932, this constitutional guarantee belonged only to those who could afford a lawyer. *Powell* recognized the need of the accused for "the guiding hand of counsel at every state of the proceedings against him."[2] The Court concluded that the mere formal appointment of the entire local bar as defense counsel on the morning of the trial was a denial of the accused's rights to secure effective assistance of counsel, and a "denial of due process within the meaning of the Fourteenth Amendment."[3] In view of the circumstances of the case the Court felt:

> All that is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.[4]

The cases involving adequacy of counsel since *Powell* are generally of three types: (1) counsel is so inept or incompetent that he, by his acts or omissions, fails to provide effective assistance; (2) counsel, though eminently qualified and conducting the defense to the best of his ability, is faced with a conflict of interest among his plural clients which deprives one or more of them of effective assistance; and (3) extrinsic factors beyond the control of counsel, such as lack of time to adequately prepare, make effective assistance impossible.

Attacks upon lawyers as ineffective, inadequate or incompetent have multiplied greatly since the Supreme Court decided, in *Gideon v. Wainwright*,[5] that an indigent must be provided an attorney in all prosecutions involving "serious offenses."[6] An allegation of inadequacy of counsel

[1] 287 U.S. 45 (1932). Prior to the Powell decision, the majority of jurisdictions in the country provided by statute for appointment of counsel in all capital cases, and some jurisdictions extended it to felonies.

[2] *Id.* at 69.

[3] *Id.* at 71.

[4] *Id.* at 71.

[5] 372 U.S. 335 (1963).

[6] *Id. See also* Duncan v. Louisiana, 391 U.S. 145 (1968).

now seems to be included as a matter of course in almost all habeas corpus petitions and in most appeals affected by a lawyer who was not involved in the trial of the case.[7] As it seems safe to assume that everyone in prison is at least somewhat disappointed with the performance of his lawyer, such allegations will very likely increase.

Since *Gideon,* the Supreme Court has moved to fully implement the call in *Powell* for the presence of "the guiding hand of counsel in every step of the proceedings. . . ."[8] The matter for determination is whether the step is critical.[9] Counsel must be present, unless intelligently waived,[10] from the moment the focus is on the accused[11] at interrogation,[12] at a line-up,[13] at a preliminary hearing,[14] at arraignment,[15] at trial,[16] at sentencing or revocation of probation,[17] and on appeal.[18] The right extends to juvenile courts as well.[19] It is the duty of the court to provide counsel; the defendant need not ask.[20]

Presence alone is insufficient; counsel must be effective. This paper is an attempt to define ineffective assistance, and to determine under what circumstances lack of effective assistance of counsel deprives a defendant of due process of law to the extent that his conviction may be voided or his plea of guilty set aside.

II. Ineffective Assistance of Counsel Due to the Acts or Omissions of the Defense Attorney

What must defense counsel do to be effective? He may not "stand still and do nothing. That indeed might be the best evidence of incompetency, or infidelity, or ineffectiveness or all three."[21] In *Stewart v. State,*[22] the Mississippi Supreme Court found that the attorney involved, "so far as this record shows, did nothing for the defendant until after the

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[7] The Illinois Supreme Court, on September 22, 1970, handed down seven decisions involving assertions of lack of effective assistance of counsel.

[8] 287 U.S. at 69.

[9] Miranda v. Arizona, 384 U.S. 436 (1966).

[10] *Id.*

[11] Escobedo v. Illinois, 378 U.S. 478 (1964).

[12] Miranda v. Arizona, 384 U.S. 436 (1966).

[13] United States v. Wade, 388 U.S. 218 (1967).

[14] Pointer v. Texas, 380 U.S. 400 (1965).

[15] Hamilton v. Alabama, 368 U.S. 52 (1961).

[16] Gideon v. Wainwright, 372 U.S. 335 (1963).

[17] Mempa v. Rhay, 389 U.S. 128 (1967).

[18] Douglas v. California, 372 U.S. 353 (1963).

[19] *In re* Gault, 387 U.S. 1 (1967).

[20] Carnley v. Cochran, 369 U.S. 506 (1962).

[21] Williams v. Beto, 354 F.2d 698, 706 (5th Cir. 1966).

[22] 229 So. 2d 53 (Miss. 1969).

case had been tried and the verdict returned."[23] The Court concluded that the defendant "has not been accorded due process of law. . . ."[24]

It is the duty of counsel to be "unswervingly faithful in the discharge of their duties,"[25] "faithful to his trust,"[26] "a vigorous advocate having the single aim of acquittal by all means fair and honorable,"[27] to exhibit "entire devotion to the interest of the client,"[28] and "warm zeal in the maintenance and defense of his rights."[29] He is not required to be errorless,[30] neither is he to be judged by whether he wins or loses.[31] He is required to do that which is clear as a matter of law; *e.g.*, to examine the sufficiency of the indictment or information, and to conduct some investigation of the facts. Failure to pursue all available defenses is not necessarily ineffective; this is a decision within the discretion of trial counsel.[32] Failure to call a particular witness,[33] to put the defendant on the stand,[34] to advise the defendant to plead guilty on the hope of a more lenient sentence even when that hope is not realized,[35] are also determinations properly within the province of counsel. Counsel is charged with the responsibility for the conduct of the defense and does not have to proceed according to the whim of the defendant,[36] but any action of counsel which is motivated by a clearly erroneous legal assumption may compel a finding of inadequacy.[37]

It is well known that many able trial lawyers will not object to the introduction of all evidence that could be excluded for fear that such objection will only emphasize the evidence, or leave the jury in speculation as to the potential of what they were denied on a legal technicality; however, to allow the introduction of evidence which is both excludable and damaging may be ruled ineffective assistance. Allowing the waiver of any constitutional right when there is a reasonable possibility that

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[23] *Id.* at 54.

[24] *Id.* at 56.

[25] Williams v. Beto, 354 F.2d 698, 705 (5th Cir. 1966).

[26] *Id.* at 706.

[27] Porter v. United States, 298 F.2d 461, 463 (5th Cir. 1962).

[28] ABA CANONS OF PROFESSIONAL ETHICS No. 15.

[29] *Id.*

[30] Pineda v. Baily, 340 F.2d 162 (5th Cir. 1965); MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960).

[31] Mize v. Crouse, 399 F.2d 593 (10th Cir. 1968); Johnson v. United States, 380 F.2d 810 (10th Cir. 1967); Opie v. Meacham, 293 F. Supp. 647 (D.D.C. 1968).

[32] Berry v. United States, 286 F. Supp. 816 (E.D. Pa. 1968); Mitchell v. State, 179 Miss. 814, 176 So. 743 (1937).

[33] Tompa v. Virginia *ex rel.* Cunningham, 331 F.2d 552 (4th Cir. 1964).

[34] Poe v. United States, 233 F. Supp. 173 (D.D.C. 1964).

[35] Monroe v. Huff, 145 F.2d 249 (D.C. Cir. 1944).

[36] *In re* Luna, 65 Cal. Rptr. 121 (1968).

[37] Poe v. United States, 233 F. Supp. 173 (D.D.C. 1964).

such waiver "might have contributed to the conviction"[38] also risks a ruling of ineffective assistance.

The application of the reasonable possibility of harm test is difficult because the record only shows what was, not what might have been. Allegations of omissions can only lead to speculation of whether a different result would have been reached. This uncertainty leads courts instead to consider the strength of the prosecution's case, to see whether there was a reasonable certainty that it could have withstood any defense which might have been raised.[39] Such an estimation of the relative strengths of the cases of the prosecution and of the defense is not uncommon. In *Mitchell v. State*,[40] the court observed:

> All that the attorney had before him, or upon diligence could ascertain, was that the defendant was a cruel, crafty, and designing muderer, with full sensibility at all times of the nature and consequences of his act, and of his accountability to the law therefor. Rather than take the risk of a plea of insanity which could not be sustained, the attorney did the best he could, and produced the evidence of the defendant that he had no recollection of the crime, and the testimony of relatives that appellant suffered from periods of forgetfulness, hoping thereby to avoid the extreme sentence of death; and that the jury rejected the bid for mercy was no fault of the attorney.[41]

Mr. Justice Stewart indicated in his concurring opinion in *Chapman v. California*,[42] that failure to supply counsel at the trial could never be held harmless error. If this is true, and if inadequate counsel is equated with no representation at all, it follows that inadequate counsel is never harmless. The courts evade this by focusing attention, as in *Katz*,[43] not on ineffectiveness, nor on harmless ineffectiveness, but instead on the fact that since there "is not too much the best defense attorney . . ."[44] could have done, there was no ineffectiveness (sufficient to justify reversal), regardless of what counsel failed to do. Whether the Supreme Court will accept such reasoning is questionable.

An attorney who rises above the point of no representation at all

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[38] Chapman v. California, 386 U.S. 18, 23 (1967); Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963).

[39] The Second Circuit said in United States v. Katz, 425 F.2d 928 (2d Cir. 1970), "When, as here, the prosecution has an overwhelming case based on documents and the testimony of disinterested witnesses, there is not too much the best defense attorney can do." *Id.* at 930.

[40] 179 Miss. 814, 176 So. 743 (1937).

[41] *Id.* at 827-28, 176 So. at 746.

[42] 386 U.S. 18 (1967).

[43] 425 F.2d 928 (2d Cir. 1970).

[44] *Id.* at 930.

may still fall short of effective representation if he commits errors judged by the reviewing court as substantially contributing to the conviction. Probably the clearest example of such error is to allow the introduction of a confession which could have been excluded. The emphasis in *Jackson v. Denno*[45] and *Bruton v. United States*[46] on the especially damaging effects of confessions seems to indicate that the failure to exclude is inadequate representation *per se*.

The evident confusion involved in trying to determine not only what amounts to inadequacy, but to assess the contribution of that inadequacy to the conviction is compounded by the state action distinction between retained and appointed counsel,[47] which, though subjected to vigorous criticism, is still in effect. If privately retained counsel is held to a lower standard than appointed counsel, perhaps some sort of harmless error test can be applied to the mistakes of private counsel. The United States Supreme Court has not yet decided whether there is such a double standard. The lower courts are divided on the issue. In *Bell v. Alabama*,[48] Judge Tuttle, commenting on the effective assistance of counsel test said, "It is clear that this test applies to cases in which counsel is retained by or for an accused as well as to cases in which counsel is appointed to represent an indigent defendant."[49] The Fifth Circuit has since distinguished between private and court appointed counsel.

> There is, of course, a distinction to be made between the lack of effective assistance of competent counsel and *being denied the right* to have the effective assistance of competent counsel. It is the latter that opens a judgment to challenge by habeas corpus. Here the attorney's alleged incompetence cannot be imputed to the state.[50]

When deciding counsel's effectiveness, does or should the reviewing court judge the assistance given or the attorney who gave it? While it is common for courts denying relief to cite the qualifications, experience, and reputation of counsel in justifying that denial, it is understandably less common for the court to cite the lack of these attributes when voiding a conviction. It is delicate enough to brand an attorney's representation as inadequate without going into the details, although this is occasionally done.

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[45] 378 U.S. 368 (1964).

[46] 391 U.S. 123 (1968).

[47] Hendrickson v. Overlade, 131 F. Supp. 561 (N.D. Ind. 1955).

[48] 367 F.2d 243 (5th Cir. 1966).

[49] *Id.* at 247.

[50] Howard v. Beto, 375 F.2d 441, 442 (5th Cir. 1967). Judge Brown of the Fifth Circuit said in Porter v. United States, 298 F.2d 461 (5th Cir. 1962), "The Constitution assures a defendant effective representation by counsel whether the attorney is one of his choosing or court-appointed." *Id.* at 463.

In *McKenna v. Ellis*,[51] two young lawyers just out of law school were appointed to represent the defendant, who promptly objected in open court to their appointment. Further, the two lawyers had applications for employment with the district attorney pending at the time of their representation, and were, in the words of one, "sort of practicing on our own when we were waiting for an opening in the District Attorney's Office."[52] Noting the inexperience of counsel, and the conflict of interest involved, the court pointed out that counsel made no request for a continuance despite an extremely short trial notice, and made no objection to moving the trial up still further to suit the convenience of the district attorney. Defendant requested a continuance himself in open court with his lawyers present, but was refused. The lawyers subpoenaed no witnesses, although names and addresses of several were furnished to them by their client. On habeas corpus the Fifth Circuit vacated the conviction:

> We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* reasonably effective assistance. We consider undivided loyalty of appointed counsel to client as essential to due process.
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> . . . .
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> A trial judge who appoints fledgeling attorneys as defense counsel, over the defendant's protest, cannot wash his hands of their mistakes. Fundamental fairness to a person accused of crime requires such judicial guidance of the conduct of a trial that when it becomes apparent appointed counsel are not protecting the accused the trial judge should move in and protect him.[53]

How a trial judge in a situation such as the above could protect a defendant other than by declaring a mistrial is a matter of speculation; any active participation in the trial by the judge would court reversal on other grounds.

In *Ex Parte Black*,[54] the habeas corpus petition was denied. The dissent pointed out that the defendant was represented by a lawyer who seemed to make a practice of representing guilty defendants. On the day of petitioner's trial, all nine defendants represented by this attorney entered pleas of guilty. On a previous date eight other accused felons whom he represented pleaded guilty. The trial court, on its own motion, granted a new trial for one of these when it subsequently developed that he was under the age of seventeen. This was, to the dis-

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[51] 280 F.2d 592 (5th Cir. 1960).

[52] *Id.* at 600.

[53] *Id.* at 599-600.

[54] 457 S.W.2d 919 (Tex. Crim. App. 1970).

senting judge "some indication of the amount of preparation involved in [the attorney's] practice of criminal law."[55] At petitioner's trial, a prior nonadmissible murder conviction was read to the jury. The jury was instructed that they might consider the prior conviction in assessing punishment, "without a word of protest"[56] from defendant's attorney. The dissent noted, the attorney "has never represented a litigant in a contested criminal case; he has also never representd a litigant in a contested civil case."[57]

In *Pineda v. Bailey*[58] the court examined the record of the defense attorney regarding his prior convictions for his failure to file income tax returns and his consent, after petitioner's trial, to a decree suspending him from the practice of law for two years. There was also confusion as to exactly how the attorney came to represent petitioner. Apparently he volunteered for the job, although his client thought, until after the start of the trial, that he was court appointed. Counsel consulted with the petitioner on two occasions prior to trial for less than five minutes each. This was his total preparation. The court concluded that this attorney failed to bring to his client's defense,

> the zeal which the law requires for his defense. . . . Effective assistance [of counsel for purposes of constitutional rights] does not mean that a defendant is entitled to have the best counsel appointed, or any particular counsel, but it does mean that he must have such assistance as will assure him due process of law.[59]

Mississippi courts are reluctant to look beyond the trial record for evidence of incompetency. In *Stevens v. State*[60] the court said, "The examination of the record discloses that the attorney ably represented the appellant and manifested competence and ability. The attack on him is by ex parte affidavits attached to the petition which, of course, we cannot consider."[61]

Despite the talk of faithfulness, vigor, and warm zeal in rendering effective assistance, probably the most quoted standard is the holding in *Williams v. Beto*:[62]

> [R]elief from a final conviction on the ground of incompetent or ineffective counsel will be granted only when the trial was a

[55] *Id.* at 924 (dissenting opinion).
[56] *Id.* at 922 (dissenting opinion).
[57] *Id.* at 924 (dissenting opinion).
[58] 340 F.2d 162 (5th Cir. 1965).
[59] *Id.* at 164.
[60] 232 So. 2d 730 (Miss. 1970).
[61] *Id.* at 730-31.
[62] 354 F.2d 698 (5th Cir. 1965).

> farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, . . . or without adequate opportunity for conference or preparation.[63]

Other than a rather general observation that incompetency is established by errors in clear matters of law, there is really no objective standard to determine when an attorney's representation will be held to be so lacking as to amount to a denial of due process of law.

It is submitted that ineffective assistance is susceptible to no less nebulous definition than is due process. It has been said:

> [A] study of rulings in over fifty states and selected federal jurisdictions leads to the inevitable conclusion that there is no uniformity of decision and no certainty in the cases in which a convicted criminal defended by retained counsel, seeking post-conviction relief, pleads that his trial counsel was incompetent and inadequate.[64]

The decisions involving court appointed counsel are no more clear.

III. Conflict of Interest

In *Glasser v. United States*,[65] the Supreme Court held "the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests."[66] A conflict of interest may be found in any situation in which an attorney's decisions in the conduct of the defense are, or may be, influenced by concern for the effect of those decisions on another client. He is, thus, unable to bring "entire devotion" to the interest of any one defendant. This does not mean that there is inherent conflict in joint representation.[67] *Glasser* may also be read to require that a defendant is entitled to counsel to represent him alone if he so requests, because "the additional burden of representing another party may conceivably impair counsel's effectiveness."[68]

Once a conflict appears, must reversal be automatic, if not corrected by additional appointment or adjournment to allow retention of separate counsel, or may the conflict be ruled harmless?[69] *Glasser* seems

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[63] *Id.* at 704; *see also*, Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 Harv. L. Rev. 1434 (1965).

[64] Polur, *Retained Counsel, Appointed Counsel: Why the Dichotomy?*, 55 A.B.A.J. 254 (1969).

[65] 315 U.S. 60 (1942).

[66] *Id.* at 70.

[67] Lollar v. United States, 376 F.2d 243 (Ct. App. D.C. 1967).

[68] 315 U.S. at 75.

[69] Glasser v. United States, 315 F.2d 60 (1942), held: "The right to have the effective

to hold that the conflict itself and its concurrent "possibility of harm"[70] requires reversal. Other courts have chosen to engage in at least slight calculations of the amount of harm done, and have concluded that some degree of prejudice has to be shown to justify overturning a conviction. The decision in *Brown v. State*[71] adhered to the latter view, but required slight prejudice in finding that the attorney "was not effective as he might have been had the conflict not existed."[72] Other courts have required a more definite showing of actual prejudice. *People v. Morris*[73] considered the *Glasser* decision and decided that "it is difficult to formulate a standard by which this type of case can be judged."[74] Despite having just finished quoting *Glasser's* admonition against "nice calculations,"[75] the court concluded:

> However, based both on precedent and reason, we believe that in order to sustain his position here the defendant must clearly establish: (1) actual incompetency of counsel, as reflected by the manner of carrying out his duties as a trial attorney; and (2) substantial prejudice resulting therefrom, without which the outcome would probably have been different. Due to the nature of the inquiry it is hardly possible to be more definite, and each case will have to be judged on its own particular facts as they appear in the context of the proceeding under consideration.[76]

Still others have blurred the definitions of conflict and prejudice and concluded that absent prejudice, there was no conflict[77]—similar to the reasoning that absent prejudice, there was no incompetency.

Parallel to the fear that allowing relief on the grounds of inadequacy of counsel will permit the unscrupulous lawyer, by doing nothing to obtain a new trial,[78] is the uneasiness that some defendants might, by remaining silent until the completion of trial, secure reversal because of a conflict unknown to the trial judge.[79]

The criterion in the cases involving privately retained counsel is whether defendant knows of and acquiesces in the conflict. If he does,

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assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Id.* at 76.

[70] Lott v. United States, 218 F.2d 675 (5th Cir. 1955).

[71] 10 Md. App. 215, 269 A.2d 96 (1970).

[72] 269 A.2d at 104.

[73] 3 Ill. 2d 437, 121 N.E.2d 810 (1954).

[74] 121 N.E.2d at 817.

[75] 315 U.S. at 76.

[76] People v. Morris, 3 Ill. 2d 437, 121 N.E.2d 810, 817 (1954).

[77] Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967).

[78] Berg v. Cranor, 209 F.2d 567 (9th Cir. 1954).

[79] People v. Chapman, 66 Ill. App. 2d 162, 214 N.E.2d 313 (1965).

then he is deemed to have waived his right to separate counsel.[80] The same rule would probably apply to indigent defendants if there were proof they knew of and assented to the conflict. Proof would be necessary because a waiver of fundamental rights cannot be presumed from a silent record.[81]

Porter v. United States[82] held that effective representation is lacking "if counsel, unknown to the accused and without his knowledgeable assent, is in a duplicitous position where his full talents—as a vigorous advocate having the single aim of acquittal by all means fair and honorable—are hobbled or fettered or restrained by commitments to others."[83]

IV. Adequate Preparation

It is the duty of the court to appoint counsel in time to allow the attorney to render effective assistance at trial.[84] If the court determines that appointment is not required, the defendant must use reasonable diligence in securing counsel, and is not to use his right to an attorney to frustrate the orderly process of the court's business.[85]

Counsel must have sufficient time to investigate, to summon witnesses, and to prepare for trail; however, lack of time alone does not necessarily mean ineffective assistance. The United States Supreme Court in *Chambers v. Maroney*[86] held:

> Unquestionably, the courts should make every effort to effect early appointments of counsel in all cases. But we are not disposed to fashion a *per se* ruling requiring reversal of every conviction following tardy appointment of counsel or to hold that, whenever a habeas corpus petition alleges a belated appointment, an evidentiary hearing must be held to determine whether the defendant has been denied his constitutional right to counsel.[87]

Although this clearly indicates that some prejudice must be shown

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[80] People v. Tyler, 65 Cal. Rptr. 907 (1968).

[81] Porter v. United States, 298 F.2d 461 (5th Cir. 1962); Carnley v. Cochran, 369 U.S. 506 (1962).

[82] 298 F.2d 461 (5th Cir. 1962).

[83] *Id.* at 463.

[84] Powell v. Alabama, 287 U.S. 45 (1932).

[85] United States *ex rel* Davis v. McMann, 386 F.2d 611 (2d Cir. 1967); United States v. Birrell, 286 F. Supp. 885 (S.D.N.Y. 1968). Defendant has a choice of proceeding without counsel and will not be allowed to arbitrarily dismiss his attorney in order to secure a continuance or an adjournment. United States *ex rel* Davis v. McMann, 386 F.2d 611 (2d Cir. 1967).

[86] 399 U.S. 42 (1970).

[87] *Id.* at 53.

to warrant reversal due to inadequate time, it does not indicate how much prejudice is required. Must the attorney be less effective than he might have been due to the failure of the court to allow him sufficient time, or must the defendant show that his representation was a farce, a mockery of justice? Justice Harlan, in dissent in *Chambers*, felt that the circumstances of the case

> called for more exploration by the District Court before petitioner's ineffective assistance of counsel claim could be dismissed. Such an exploration should have been directed to ascertain whether the circumstances under which [counsel] was required to undertake petitioner's defense at the second trial were such as to send him into the courtroom with so little knowledge of the case as to render him incapable of affording his client adequate representation. The event of that exploration would turn not on a mere assessment of particular missteps or omissions of counsel, whether or not caused by negligence . . . but on the District Court's evaluation of the total picture, with the objective of determining whether petitioner was deprived of rudimentary legal assistance.[88]

Still, the question of how much prejudice must be shown is unanswered.

V. Adequate Funds

The indigent's need for money to conduct some sort of investigation to aid in his defense has been recognized by the Criminal Justice Act of 1964[89] and by many states. Other jurisdictions make no such provisions.[90]

Even in those jurisdictions which deny such funds, counsel for an indigent should request the needed funds, and carefully stipulate why and how they are to be used, thus preserving grounds for possible appeal. In *United States v. Products Marketing*,[91] attorneys for seven defendants charged with mail fraud showed the court that they would have to examine almost 50,000 documents and would need copies of many. Extensive travel costs were also needed. There was no way in which these expenses could be provided; therefore, the indictments were dropped. The trial judge held that to try the defendants under such circumstances would deny them their right to effective assistance of counsel.

VI. Conclusion

So far the major concern in this area has been with the quality of

[88] *Id.* at 55 (dissenting opinion).

[89] 18 U.S.C. § 3006A (Supp. V, 1965), *amending* 18 U.S.C. § 3006A (1964).

[90] Laughter v. State, 235 So. 2d 468 (Miss. 1970).

[91] 281 F. Supp. 348 (Del. 1968).

the representation afforded indigent defendents. No doubt the same motivation led the United States Supreme Court to observe in *Griffin v. Illinois*[92] that "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[93] Although this feeling is admirable, one suspects that an indigent defendant is in a better position than the almost-indigent one. The possibility that inadequate counsel may have been retained because the defendant could not afford adequate counsel is often ignored.

The current practice by the judiciary of conducting informed speculation on the entire set of circumstances needs to be replaced with sufficient guidelines to enable all members of the Bar to understand their responsibility as protectors of those who not only are poor but are also charged with crime. The attorney should be held to a meaningful standard of professional responsibility.

A single standard for the effectiveness of retained or appointed counsel is needed. It is submitted that the standard should begin with the objective duty of the trial court to see that an accused has an attorney to represent him who meets this standard. Realization of such a standard would require assigning to the accused, before arraignment or even earlier, reasonably competent counsel with some trial experience in criminal courts. Such counsel should also be in a position to devote proper time, attention, and energy to the accused's case and should be reimbursed for expenses incurred in preparation.

To insure that all defendants receive representation commensurate with such a standard, society must be willing to pay a reasonable fee if the defendant cannot pay for himself. Why, for example, should an individual lawyer be compelled to give his time, work, and advice without fair compensation?[94] A complete examination should be made of the defendant's financial status. Perjury should not be taken lightly, and the consequences of giving false information should be made clear to the accused. After such a determination, the court should order the amount which the defendant can afford paid into court for his representation. The difference between that amount and a reasonable fee should be provided by the court. In the alternative, an adequate public defender system would realistically provide an acceptable minimum standard of legal assistance for all defendants.

If a defendant has had representation which conforms to an ac-

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[92] 351 U.S. 12 (1956).

[93] *Id.* at 19.

[94] *See* Williams and Bost, *The Assigned Counsel System: An Exercise of Servitude?* 42 MISS L. J. 32 (1971).

ceptable minimum standard, he should not be granted relief on the grounds of ineffective counsel, unless he can subsequently show a breach of his attorney's legal responsibilities, serious enough to warrant disciplinary action. If the attorney is so lacking in competency that representation amounts to a denial of due process, some action by the Bar is warranted.

Unquestionably, adequate representation is a necessary requisite of due process of law. The rights of an accused must be protected. Unquestionably, also, the rights of appointed counsel must be protected. This can be accomplished by a realistic, definitive standard by which to measure effectiveness of counsel, and by a procedure which will give the attorney assurance that he will be fairly compensated for that representation.

Terrell Simpson

THE CONSUMER BOYCOTT

I. Introduction

Legal questions always arise when citizens, living in a society of laws, decide to remedy grievances through a self-help device. The consumer boycott is such a self-help device, quite old in its basic concept, but brought into new prominence as a symbol of protest toward racial discrimination. Since 1955 when the black citizens of Montgomery, Alabama crippled the city bus system by refusing to ride,[1] black leaders have continued to use the boycott as a most effective weapon in their fight for civil rights. Any doubt that the boycott can be a successful weapon is quickly erased by a few examples. In 1963 the Birmingham, Alabama, retailers estimated that they were losing about $750,000 per week because of the boycott of black customers and the added loss of business of whites who were afraid to come downtown.[2] The blacks of Macon, Georgia, discontinued riding buses in 1962 to protest segregated seating. The bus company, suffering a 50 percent fare loss, gave in to the demands.[3] *The Evening Bulletin*, a Philadelphia newspaper, estimated that it lost 25,000 to 50,000 subscriptions between April 15 and June 10, 1962, due to a boycott protesting certain policies regarding news about the black community.[4]

Boycotts are not necessarily confined to a single area or a single object. Operation Breadbasket, led by the Reverend Jesse Jackson, is a national boycott based in Chicago. For sixteen weeks in the spring of 1969 blacks boycotted all of the A&P Company stores of Chicago.[5] The objective was to secure more jobs for blacks and a market for twenty-five products manufactured by black-owned firms. The boycott ended when A&P promised 286 more jobs for blacks and placed all the products on their shelves. Nationally, Operation Breadbasket has created 5,000 jobs and acquired $40 million in annual salaries for blacks.[6] Mr. Jackson has been quite candid in speaking of the project's goals:

Our goals are aimed at rooting out America's internal disease.

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[1] New York Times, Feb. 22, 1956, at 1, col. 6.

[2] Time, June 7, 1963 at 95.

[3] *Id.* The same source lists these less impressive, but important results. Sixteen clerks' jobs were obtained in Charleston, South Carolina, by the use of "selective buying" and "name the traitor" meetings. Blacks were hired and upgraded by Tip Top Bread and Borden's Milk in 1962 in Detroit due to consumer boycotts. A 29-day selective buying campaign in Boston against the Continental Baking Co. resulted in the hiring of eight black salesmen.

[4] New Republic, July 9, 1962, at 6.

[5] Business Week, Apr. 26, 1969, at 162.

[6] *Id.*

> The real power structure of this country involves government, the business community, and organized labor. . . . [Negroes have power over] marginal profits in the ghetto. There are enough of us to make that power count. We can become the fourth big element in the power structure of this country.[7]

Consumer boycotts sometimes attract tremendous sympathy from the general public. For many years a large segment of the public has been concerned about the low quality of life of migrant farm workers. When Caesar Chavez, leader of the National Farm Workers Association, called for a nationwide boycott of table grapes in 1968, sales were reduced by 12 percent.[8] Prices of table grapes dropped by 15 percent.[9] This pressure was partly responsible for making many growers recognize the union.

Although boycotts have had the most success in the field of minority rights, other groups have and are promoting boycotts. David E. Kaun, associate professor of economics at the University of California at Santa Cruz, has formed one of several groups urging "positive spending for peace."[10] It is the misfortune of the pacifists that they are not sufficiently concentrated in small areas to be as effective as other minority groups, but time and subsequent developments will tell whether their economic power can become great enough to affect government policy.

Housewives throughout the country recently gained shortlived attention with their supermarket boycotts, protesting the high prices of many foods, particularly meat.[11] Organization was fragmented, and middle-class Americans are probably hopelessly addicted to meat even at high prices. No one can doubt, however, that any serious and long-term boycott by housewives in a particular area could have great effect on a local grocer.

Commercial boycotts by businesses and boycotts by labor unions are well regulated by federal law. In a few instances this regulation has been applied to non-commercial boycotts, but generally one must look elsewhere for settlement. What is the status of the consumer boycott? What are the rights of the consumer and the businessman? These are the questions that this paper proposes to answer. The answer is found in a context of constitutional law, common-law tort concepts and considerations of public policy.

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[7] *Id.* at 166.
[8] TIME, July 4, 1969, at 18.
[9] TIME, June 27, 1969, at 18.
[10] NEW REPUBLIC, May 30, 1970, at 12.
[11] BUSINESS WEEK, Oct. 22, 1966, at 42.

II. The Constitutional Context

> The right of an individual or group of individuals to protest in a peaceable manner against injustice or oppression, actual or merely fancied, is one to be cherished and not to be proscribed in any well-ordered society. It is an essential prerogative of free men living with democratic institutions.[12]

The consumer boycott is a protest against what the boycotters see as injustice. Whether the object is lowering prices, ending a war, or ending racial discrimination, the boycott is an expression of opinion, and, as such, enjoys constitutional protection grounded on the first amendment. Free speech, however, is not an absolute right. It should further be noted that boycotts are an assertion of economic power. They are accompanied by some form of promotional activity, usually picketing.

Constitutional law regulating picketing has developed largely in labor cases. For some time regulation of labor picketing, as well as other labor activities, was left largely to the states. In 1937 the United States Supreme Court decided *Senn v. Tile Layers Protective Union*[13] in which it was stated: "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."[14] This dictum forecasts the principle that picketing is a form of protected expression; therefore, final judgment on the propriety of limitations will be with the Supreme Court. Several states accepted the principles as law and applied it.[15]

Picketing was more directly equated with free speech in *Thornhill v. Alabama*.[16] Thornhill was convicted of violating Section 3448 of the 1923 Alabama Code. The law provided generally that any person who, without just cause and with the intent of influencing others, interferes with the business of another is guilty of a punishable act. The statute was so broad that it proscribed every effective way employees had of acquainting the public with their disputes with their employer. Thornhill's conviction was reversed.

The Supreme Court recognized that in allowing the picketing some

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[12] Julie Baking Co. v. Graymond, 274 N.Y.S. 250, 251-52 (Sup. Ct. 1934).

[13] 301 U.S. 468 (1937).

[14] *Id.* at 478.

[15] Teamsters Local 13 v. Perry Truck Lines, 106 Colo. 25, 101 P.2d 436 (1940); City of Reno v. Second Judicial District Court, 59 Nev. 416, 95 P.2d 994 (1939); San Angelo v. Amalgamated Meat Cutters, 139 S.W.2d 843 (Tex. Civ. App. 1940).

[16] 310 U.S. 88 (1940). A like result was reached the same day in Carlson v. California, 310 U.S. 106 (1940).

persons might be persuaded not to trade with the employer in question. Striking the Alabama statute, Justice Murphy wrote:

> Every expression of opinion on matters that are important has the potentiality of inducing action in the interest of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may be persuaded to take action inconsistent with its interest. Abridgement of the liberty of such discussion can be justified only where the clear danger of substantive evil arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion.[17]

There were other words, however, which indicated that *Thornhill* did not confer an absolute right to picket. According to the Court, the Alabama statute was struck because:

> [the statute] leaves room for no exceptions based upon either the number of persons engaged in the proscribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and accurateness of the terminology used in notifying the public of the facts of the dispute.[18]

With the exception of *AFL v. Swing*,[19] which extended constitutional protection to picketing in the absence of a labor dispute, *Thornhill* represents the apex of first amendment protection for picketing. The *Thornhill* doctrine was soon modified by a series of United States Supreme Court cases which upheld state limitations on picketing.[20]

Gibboney v. Empire Storage and Ice Co.[21] took a giant step back from the *Thornhill* doctrine. The Court concluded that the appellants were using their great economic power to compel Empire to accept union rather than state regulation of trade. The test for regulating free speech was that states could prohibit a form of expression only if such prohibition were necessary to the regulation of conduct which the state can legally regulate. In *Teamsters Union v. Vogt*,[22] the Court recognized that there is a broad field in which states may enforce some

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[17] 310 U.S. 88, 104-05 (1940).

[18] *Id.* at 99.

[19] 312 U.S. 321 (1941).

[20] Examples are picketing of homes, Electricians Local 1111 v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942) and limiting picketing to the area of the industry where the dispute has occurred, Carpenters & Joiners Local 213 v. Ritter's Cafe, 315 U.S. 722 (1942).

[21] 336 U.S. 490 (1949).

[22] 354 U.S. 284 (1957).

public policy, in this case preventing an employer from being forced to hire 100 percent A.F.L. labor, by enjoining picketing. Justice Douglas, dissenting, said that the *Vogt* decision was so broad as to allow states to prohibit any particular picketing as long as they did not prohibit all picketing.[23]

There were strong policy reasons for the retreat from *Thornhill* in the labor field. In *Thornhill* the Court was concerned with the communication of ideas. *Gibboney* and *Vogt* presented questions of the use of great and coercive economic power to achieve objectives. Of course, the consumer boycott is also an exercise of economic power; but when it is carried out peacefully, and without intimidation, the success of the consumer boycott depends upon the acceptance by a large segment of the public of those ideas proposed by the pickets. Unions, on the other hand, have almost limitless power of internal regulation over members and potential members. A union member who votes against a strike or boycott is bound by the majority decision if he wishes to retain the benefits of association. Not so the consumer who may choose to buy here or there without threat to his economic security.

Indications are that the *Thornhill* standards, peaceful manner, truthful assertions of grievances, and absence of coercive tactics, still apply to consumer picketing. The Fifth Circuit Court of Appeals has had several opportunities to express its opinion on this subject. In 1964 that court had to decide whether the Albany Movement could picket the stores of Albany, Georgia, to induce a boycott by black customers. Deciding affirmatively, the Fifth Circuit stated: "Peaceful picketing for the object of eliminating racial discrimination in department stores open to the general public is a right embraced in free speech under the First Amendment to the Constitution and made applicable to the states by the Fourteenth Amendment."[24] Five years later in *Machesky v. Bizzell*,[25] a consumer boycott case, the Fifth Circuit dissolved a state court injunction prohibiting all picketing in designated areas of Greenwood, Mississippi. The Circuit quoted the United States Supreme Court: "We start from the premise that peaceful picketing carried on in a location open generally to the public is, absent other factors involving the purpose or manner of the picketing, protected by the First Amendment."[26]

These cases alone do not completely dispel the fear of Justice

[23] *Id.* at 297.

[24] Kelly v. Page, 335 F.2d 114, 119 (5th Cir. 1964).

[25] 414 F.2d 283 (5th Cir. 1969).

[26] *Id.* at 290 citing Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308, 313 (1968).

Douglas in his dissent in *Vogt*. In both cases it was a blanket prohibition, the only kind Justice Douglas thought would fail, that the state courts tried to enforce. Other language in the *Machesky* decision, however, indicates that some specific guidelines were considered. An injunction is unconstitutionally overbroad if it "lumps the protected with the unprotected in such a way as to abridge important public interests in the full dissemination of public expression on public issues."[27] It is interesting to note here that the court was protecting the right of the pickets to boycott and attempt to persuade others to do so and was also protecting the right of the public to hear the opinions.

Discussion of first amendment protection for consumer boycotts is primarily a discussion of protection for picketing because that is the activity usually chosen to promote a boycott. It is probably safe to assert that standards similar to those governing picketing apply to other types of promotional activity. Several Negroes were arrested for violating section 56 of the Alabama Code, a law which made circulating notices of a boycott a misdemeanor. Those arrested had been handing out handbills in front of several stores. The handbills asked black customers to boycott the stores because these particular businesses refused to hire black employees. It was suggested that shopping be done instead at a store listed on the paper as a fair employer. For reasons similar to those in *Machesky*, the Alabama statute was declared unconstitutional on its face by the Fifth Circuit.[28]

Limitations on first amendment protection for boycotts exist. It is impossible to list all the possible fact situations which negate constitutional protection. Violence is always a reason for enjoining boycott picketing. The governing principle here has been stated in varied ways. According to the Fifth Circuit, "On a picket line . . . and particularly in the support of a boycott of a lawful business, the Constitution affords no protection to speech which is violent, threatening, menacing, insulting, or clearly calculated to provoke a breach of the peace by others."[29]

Non-violent disruptions may be reason for limiting constitutional protection. *Clemmons v. CORE*[30] involved a mass demonstration that blocked highways. The court stated, "these rights [free expression, assembly] are subject to the elemental need for order, without which the guarantees of civil rights would be a mockery."[31] This does not

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[27] Machesky v. Bizzell, 414 F.2d 283, 291 (5th Cir. 1969).

[28] Kirkland v. Wallace, 403 F.2d 413 (5th Cir. 1968).

[29] Smith v. Grady, 411 F.2d 181, 189 (5th Cir. 1969), *citing* Wright v. City of Montgomery, 406 F.2d 867 (5th Cir. 1969).

[30] 201 F. Supp. 737 (E.D. La. 1962).

[31] *Id.* at 747.

mean that a governing body may substitute arrests for carrying out its duty to maintain order during the exercise of first amendment rights.[32] When a demonstration is an orderly expression of some protected right and threat of violence comes from an outside source such as other citizens who refuse to allow the demonstration to continue, officers are obliged to try to protect the marchers; the illegal activity of the outside group should not be used to end the demonstration. In *Cottonreader v. Johnson*[33] the court encountered such a situation. The court outlined the duty of officials with these words:

> Under such circumstances suppression by public officials or police of the rights of free speech and assembly cannot be made an easy substitute for the performance of their duty to maintain order by taking such steps as may be reasonably necessary and feasible to protect peaceable, orderly speakers, marchers or demonstrators in the exercise of their rights against violent or disorderly retaliation or attack at the hands of those who may disagree and object.[34]

The line between the duty to maintain order and the necessity for restraining free speech is a difficult one to draw. The decision must be made according to each unique set of circumstances. For this reason much litigation revolves around this point.

Violation of valid state laws also ends constitutional protection. This very reasonable requirement has been much abused. During a concentrated effort to effect a boycott of downtown merchants in Jackson, Mississippi, in 1966, blacks were arrested under a variety of statutes. One man walking alone wearing a tee shirt with NAACP on the back was arrested for parading without a permit.[35] Six pickets were arrested for obstructing the sidewalk five minutes after they appeared on the street.[36] Invalidating a large number of the arrests, the court said:

> The record discloses a pattern of conduct on the part of the officials of the city of Jackson that leads us to the conclusion that defendants took advantage of every opportunity, serious or trivial, to break up these demonstrations in protest against racial discrimination, and that a large number of the arrests had no other motive, and some had no justification whatever, either under municipal, State, or Federal law.[37]

Plaintiffs were warned, however, that "[i]t was and is incumbent

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[32] Hague v. CIO, 307 U.S. 496, 516 (1939).

[33] 252 F. Supp. 492 (M.D. Ala. 1966).

[34] *Id.* at 497.

[35] NAACP v. Thompson, 357 F.2d 831, 835 (5th Cir. 1966).

[36] *Id.*

[37] *Id.* at 838.

on them to obey valid State laws, properly administered, while asserting their protests."[38]

It is further required that the messages on picket signs and other modes of communication be true. An injunction was issued against Young Adults for Progressive Action, Inc., enjoining the group from further picketing of B & B Cash Grocery Stores.[39] The injunction was upheld on appeal because there was no evidence of discriminatory hiring practices. The court decided that since there was no record of a Negro having applied for a job, discrimination could not be proved; the boycotters, therefore, had no legal interest. Whether there actually was discrimination in hiring is questionable; in a small southern town the absence of applications is not dispositive of the issue, but this case indicates that in some jurisdictions positive proof of the accuracy of claims will be required.

Accuracy, however, is not enough. Progressive Citizens of America attempted to induce a boycott of Lucky Stores in California.[40] Lucky charged that the pickets misrepresented facts and that Lucky, in fact, had never practiced discrimination in hiring. The signs did not charge discrimination; they read: "Lucky Wont Hire Negro Clerks in Proportion to Negro Trade—Dont Patronize."[41] The boycott was enjoined because *proportional* hiring is not a legitimate goal of boycotts.[42]

The California and Florida courts do not subscribe to the theory in *Julie Baking Co. v. Graymond*[43] that protest against "merely fancied"[44] injustice is as important as that against "actual"[45] injustice. What the Florida and California courts said is that failure to have a legitimate purpose in terms of a generally recognized public policy will defeat a boycott. This situation is definitely a denial of free speech, but presently most jurisdictions require legitimate purpose if they are to protect boycott activities.

This constitutional context of protection for peaceful protests against injustice forms the outer frame of the matrix in which consumer boycotts are litigated.

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[38] *Id.*

[39] Young Adults for Progressive Action, Inc. v. B & B Cash Grocery Stores, Inc., 151 So. 2d 877 (Fla. Dist. Ct. App. 1963).

[40] Hughes v. Superior Court of California, 32 Cal. 850, 198 P.2d 885 (1948).

[41] 198 P.2d at 888.

[42] *Id.* at 889.

[43] 274 N.Y.S. 250, 251-52 (Sup. Ct. 1934).

[44] *Id.* at 251.

[45] *Id.*

III. Boyott as a Common Law Tort

The tort of interference began, according to William Prosser, with the case of *Temperton v. Russell*[46] in which the Court of Queen's Bench declared that the principles of liability for interference with contracts would extend to interference with "relations that were merely prospective or potential."[47]

Individual refusal to deal, even though malicious, is not a tort.[48] Concerted refusals to deal, as well as inducement of others not to deal, has traditionally been proscribed.[49] The ordinary tort rule is that a boycott is a *prima facie* tort. The general principle is found in section 766 of the Restatement: ". . . one who, without a privilege to do so, induces or otherwise purposely causes a third person not to . . . enter into or continue a business relation with another is liable to the other for the harm caused thereby."[50] Privilege is determined by the nature of the actor's conduct, the nature of the expectancy, the relations between the parties, the interest sought to be advanced, and the social interest in protecting the expectancy on the one hand and the actor's freedom on the other.[51] A privilege will usually be found if the actor has an economic interest, if the desired policy does not illegally restrain competition, or otherwise violate defined public policy, and if the means are not improper.[52] To escape liability a defendant is usually required by the court to prove "just cause."[53] As stated in *Booker & Kinnaird v. Louisville Board of Fire Underwriters:*

> A boycott is commonly understood by the people and is generally spoken of in the law as an unlawful thing, and this, because the ordinary trade boycott of large bodies of men is usually accompanied by acts of violence, threats, or intimidation, but I think it clear . . . there may be a lawful as well as an unlawful boycott, depending on the purpose and intention with which the boycott is inaugurated, the means and methods employed, and the ends intended to be accomplished by its existence.[54]

"Just cause" is one of those vague terms which enables courts to make decisions according to their presently prevailing policy views. There are definite signs of illegal boycott: acts of violence, threats to

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[46] [1893] 1 Q.B. 715, 62 L.J.QB. 412.

[47] W. Prosser, Torts § 124 at 974 (3d ed. 1964).

[48] Green v. Victor Talking Machine Co., 24 F.2d 378 (2d Cir. 1928).

[49] Finnegan v. Butler, 112 Misc. 280, 182 N.Y.S. 671 (Sup. Ct. 1920).

[50] Restatement (Second) of Torts § 766 (1939).

[51] *Id.* § 767 at 63.

[52] *Id.* § 771 at 82-83.

[53] Vegelahn v. Gunter, 167 Mass. 92, 44 N.E. 1077 (1896).

[54] 188 Ky. 771, 784, 224 S.W. 451, 456 (1920).

bring about violence, and the attempt to bring about the breaking of a law. Elements of legality are much more difficult to define.

Lawful purposes are many, diverse, and can only be illustrated by example. In 1934 the 174th Street Neighborhood Organization promoted a boycott of the Julie Baking Company, hoping to reduce the price of bread.[55] The picketing was upheld by the Supreme Court of New York with these words: "Rendering themselves articulate in protest against what they regard as extortionate prices for necessities of life should be permissible to consumers."[56]

Another legitimate purpose was defined in *Watch Tower Bible and Tract Society v. Doherty*.[57] The Society broadcast a religious program which allegedly featured frequent malicious material about the Catholic Church. The Reverend Doherty, a Catholic bishop, told the station and the department store which owned it that he would ask all his parishoners to withdraw their patronage from the store if the attacks continued. When the station failed to renew the Society's contract, suit was brought against Doherty. Finding for Doherty, the court said: "A right of action does not arise merely because a group withdraws its patronage or threatens to do so and induces others to do likewise where the objects sought to be obtained are legitimate."[58]

The dissemination of true information considered important to the public has been allowed even though it produced a boycott.[59]

As noted in the introduction, ending racial discrimination is the goal of many consumer boycotts. In this field there may be lawful and unlawful specific objectives. In 1937 the United States Supreme Court decided in the case of *The New Negro Alliance for Progress v. Sanitary Grocery Company*[60] that picketing aimed at creating a boycott for the purpose of forcing store owners to employ blacks was protected because it came within the definition of a labor dispute as defined in section 13 (a) of the Norris Laguardia Act.[61] Two years later a lower court restated the principle that boycotting to force employment of blacks was lawful as a matter of right without reference to a labor dispute in *Anora Amusement Corporation v. Doe*.[62]

A boycott is not lawful, however, if its purpose is to secure a cer-

[55] Julie Baking Co. v. Graymond, 274 N.Y.S. 250 (Sup. Ct. 1934).
[56] *Id.* at 252.
[57] 337 Pa. 286, 11 A.2d 147 (1940).
[58] 11 A.2d at 148.
[59] Rosman v. United Strictly Kosher Butchers, 298 N.Y.S. 343 (Sup. Ct. 1937).
[60] 303 U.S. 552 (1938).
[61] Norris-LaGuardia Act § 13 (a), U.S.C. § 101 (1964).
[62] 171 Misc. 279, 12 N.Y.S.2d 400 (Sup. Ct. 1939).

tain number of jobs for a particular group. An organization in California demanded that Lucky Stores hire blacks as whites quit or were transferred until the proportion of black clerks to white approximated the ratio of black customers to white. The Supreme Court of the United States in *Hughes v. Superior Court of California*[63] agreed with the Supreme Court of California that the boycott was illegal and quoted the California opinion:

> [the petitioners] would, to the extent of the fixed proportion, make the right to work for Lucky dependent not on fitness for the work nor on an equal right of all, regardless of race, to compete in a open market, but, rather, on membership in a particular race. . . . Yet that is precisely the type of discrimination to which petitioners avowedly object.[64]

Much earlier, in 1935, the Maryland Court of Appeals had taken a more novel approach to the same problem. *Green v. Samuelson*[65] concerned a boycott in which black citizens of Baltimore demanded that certain stores hire all black employees except managers. The court said that the purpose was the improvement of the Negro race.[66] A lower court injunction was upheld in part, but it was also held that the boycott could continue if coercive methods were not employed.

Most state courts have been eager to apply principles like that in *Hughes*. Whenever the purpose of a boycott steps over the line of demand for equal consideration for employment, it may be enjoined. For example, picketing to obtain replacement of white employees by black has been held unlawful.[67]

Illegal boycotts are often designated as conspiracies.[68] A conspiracy to injure another's business has been defined as an agreement to accomplish an unlawful objective by lawful means or to accomplish a lawful objective by unlawful means.[69] It is not a defense to a charge of conspiracy that acts condemned would have been legal if done by an individual.[70] The rationale may be that there can be no just cause in a boycott involving active participants who have no personal grievance against the target, but are merely in sympathy with the goal sought or the plight of those persons who have a grievance. The actors

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[63] 339 U.S. 460 (1950).

[64] *Id.* at 463-64.

[65] 168 Md. 421, 178 A. 109 (1935).

[66] *Id.* at 112.

[67] Fair Share Organization, Inc. v. Mitnick, 188 N.E.2d 840 (Ind. Ct. App. 1963).

[68] SCLC v. A.G. Corp., 241 So. 2d 619 (Miss. 1970).

[69] 15A C.J.S., *Conspiracy* § 10(1) (1967).

[70] Texas Public Util. Corp. v. Edwards, 99 S.W.2d 420, 425 (Tex. Ct. Civ. App. 1936).

do not have the requisite economic interest to justify their activity in a boycott.

Present case law does not speak directly to the question of what persons have a great enough personal interest in different types of boycotts to make the objective lawful. In the case of an anti-discrimination boycott, it is difficult to say who has an economic interest. If a merchant is being boycotted because he refuses to hire blacks, only those who have applied for jobs and who have been unjustly refused have a direct economic complaint against that merchant. But in view of the fact that blacks as a group have been the objects of discrimination to the detriment of the entire race, does not every black man have an interest, economic as well as social, in seeing that blacks are fairly treated? And can one say that a white man whose sense of justice is offended by racial discrimination has no "personal grievance" against the offender? It is not questioned that any prospective customer may freely decide not to patronize if he becomes acquainted with and agrees with the object of the boycott. But is the customer, who is not directly related to the grievances advanced, privileged to take an active part or perhaps initiate a boycott? Cases indicate that in anti-discrimination boycotts no questions will be asked about the personal economic interest of the leaders of the boycott. The leaders are usually black themselves. The few whites involved in initiating boycotts are usually employed by agencies whose primary goal is the eradication of racial discrimination.

Other types of consumer boycotts, however, involve public questions, which have not yet become as popular as anti-discrimination causes. The nationwide boycott of table grapes was not based on desiring recognition for one labor union. The question was part of a larger public issue: are migrant workers entitled to the privileges of association which have improved the wages and working conditions of other laborers in this country? Every citizen had the right to stop buying table grapes; did every citizen have the right to stand in front of the A&P and hand out leaflets asking customers to bypass the table grapes? The obvious answer is yes. But if that citizen has combined with others to promote the boycott in which he has no direct economic interest, he may be held to have no lawful objective and therefore be part of a conspiracy.[71]

Usually the conspiracy concept is applied to cases involving illegal means rather than illegal purpose. Any acts which may be called coercive methods will convert a legal boycott into a conspiracy.[72]

[71] Conspiracy is not a clear concept. For a good argument against using conspiracy theory in cases of public protests see Judge Coffin's dissent in United States v. Spock, 416 F.2d 165, 186 (1st Cir. 1969).

[72] Root v. Anderson, 207 S.W. 255 (Mo. Ct. App. 1918).

It may be concluded, then, that a consumer boycott by persons with a special interest to protect, carried out in a peaceful manner, seeking a legitimate objective has been protected in tort actions at common law. Where no statutory authority intervenes, these factors determine the liability of the defendant. Difficulty arises because the concepts of special interest, legitimate objective, and even peaceful manner are still evolving.

IV. Boycotts as Illegal Restraints of Trade

Are consumer boycotts subject to prosecution under the Sherman Antitrust Act[73] and other restraint of trade statutes? Professor John Coons wrote in a recent article:

> One of the whimsical realities of antitrust enforcement has been the defacto license granted to defendants acting with non-economic purposes to impose restraints of trade, some of which logically appear to fall within the purview of the Sherman Act.[74]

There are arguments both for and against using an antitrust approach to consumer boycotts. Some ways in which concerted refusals to deal have been thought to restrain trade are: 1) flow of goods is shut off; 2) freedom of action of the members of the combination is restrained; 3) freedom of action of the victim is restrained; 4) the victim may be coerced into activity such as price-fixing which is itself a restraint of trade; 5) the victim may be driven out of business, restraining trade by reducing the number of competitors; 6) the boycott may be symptomatic of dangerous power in the hands of a group that has made itself an extra-governmental agency.[75] Antitrust law seeks to prevent these restraints; the identical restraints are the secondary, if not the primary, objective of most consumer boycotts.

More specifically the Sherman Act is intended to prohibit acts which have a monopolistic tendency and those which tend to produce monopolistic consequences.[76] This idea was expressed in *Konecky v. Jewish Press*.[77] The court stated that the purpose of the Sherman Act is "to prevent the growing tendency on the part of great accumulations of property and wealth to exercise a monopolistic control of the necessities

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[73] Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1964).

[74] Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 Nw. U.L. Rev. 705 (1962).

[75] Comment, *Use of Economic Sanctions by Private Groups: Illegality Under the Sherman Act*, 30 U. Chi. L. Rev. 171, 172 (1962).

[76] Standard Oil Co. v. United States, 221 U.S. 1 (1911).

[77] 288 F. 179 (8th Cir. 1923).

of life."[78] There is ample evidence that the proponents of the Sherman Act did not envision its application to consumer boycotts, but to apply the law to activities not originally anticipated would not be a new or startling event.

Would the application of the antitrust laws be practical? In antitrust litigation the matter at issue is the effect or intended effect on competition.[79] There is little doubt that by using the *Wickard v. Filburn*[80] doctrine, a restraint on interstate commerce could be found. Consumer boycotts usually involve one merchant or a small group of merchants. The ordinary effect on national commerce is so infinitesimal that no strong policy reason for prosecuting the boycotters can be made, especially considering that merchants might bring actions against any concerted group effort, even that which has only a remote effect on competition.

It is not impossible, however, that boycotts of large dimensions could sufficiently affect trade as to create a strong policy reason for antitrust prosecution. An argument may be made that such a point has already been reached in many instances. Before Easter of 1960 approximately 98 percent of Nashville, Tennessee's black population stopped buying downtown.[81] Formerly they had spent about seven million dollars per year in Nashville stores. The results, as reported for the National Community Relations Conference, were that the local transit company found business dwindling seriously; the approximate 20 percent of department store customers who were black stayed home; another 20 percent from within a seventy-five mile radius of Nashville stayed home because of the racial tension; hundreds of white moderates in the city sympathized with the boycotters and also decided to wear old clothes on Easter.[82] By early May white merchants had met with black leaders and subsequently opened formerly segregated eating facilities to blacks.

The 1963 Birmingham boycott[83] listed earlier, in which merchants estimated a loss of $750,000 per week, is another example of a boycott with an extensive effect on trade. More serious boycotts have been threatened. In 1964 black leaders publicly asked banking houses to refuse loans to the state of Mississippi.[84] After the Selma violence in 1965,

[78] *Id.* at 182.

[79] AMA v. United States, 317 U.S. 519 (1943); United States v. Patten, 226 U.S. 525 (1913).

[80] 317 U.S. 111 (1942).

[81] L. Lomax, The Negro Revolt 130 (1962).

[82] *Id.* at 130-31.

[83] Time, June 7, 1963, at 95.

[84] E. Sobel, Civil Rights 1960-66, at 246 (1967).

Martin Luther King asked for a nationwide boycott of Alabama products.[85] This received some response; the 308 delegates to the convention of the International Longshoremen and Warehouse Union voted unanimously not to handle Alabama products.[86] There is no evidence that any widespread boycotts materialized, but in view of past success, the threats were not empty ones.

Even if consumer boycotts are susceptible to prosecution under antitrust laws, whether such boycotts are a *per se* violation is still questionable. In *Fashion Originators Guild v. FTC*[87] the Supreme Court said that justification would not be allowed as a defense to an antitrust action. In the years following there were cases in which "good purpose" boycotts were excused.[88] At the same time there were other cases applying the *per se* rule.[89]

The treatment of labor in antitrust actions indicates that the courts are not likely to apply the *per se* rule to consumer boycotts. A look at early labor-antitrust cases shows a "grudging judicial respect for values other than, and sometimes inconsistent with, those of an unrestrained market. These values, as the perceived objects of group activity we have given the name of purpose."[90] As recently as 1959, the Supreme Court repeated this policy in the dicta of *Klor's, Inc. v. Broadway-Hale Stores, Inc.*[91] Included was the statement that "the [Sherman] Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives."[92]

A consideration of purpose becomes especially necessary when one recognizes that consumer boycotts are exercises of first amendment rights. These are often balanced against considerations of public policy, but they are cast aside only when the public policy involved is of great weight. Noerr Motor Freight, Inc., brought an antitrust suit against the Eastern Railroads Presidents Conference[93] because the railroads had

[85] *Id.* at 306.

[86] *Id.*

[87] 312 U.S. 457 (1941).

[88] Interborough News Co. v. Curtis Pub. Co., 127 F. Supp. 286, 297 (S.D.N.Y. 1954); Hughes Tool Co. v. Motion Picture Ass'n, 66 F. Supp. 1006 (S.D.N.Y. 1946).

[89] Evening News Pub. Co. v. Allied Newspaper Carriers, 160 F. Supp. 568 (D.N.J. 1958); United States v. Minnesota Elec. Contractors Ass'n. 99 F. Supp. 75 (D. Minn. 1951).

[90] Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW. U.L. REV. 705,742 (1962).

[91] 359 U.S. 207 (1959).

[92] *Id.* at 213.

[93] Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

conducted a successful campaign in the state legislature which resulted in legislation harmful to trucking interests. The intent and the effect of the lobbying was obviously to give railroads a competitive advantage. The Supreme Court reversed a lower court decision granting an injunction and treble damages. The Court held that the railroad activity was political and not economic, despite its effect, and the Sherman Act was not designed to regulate political activity. It would be useless to try to guess how the *Noerr* decision affects other similar cases, but there arises from the case the inference that some rights, specifically that of petitioning the government, are more important than any subsequent economic effect. Surely a consumer group, vocalizing grievances, is worthy of as much protection as a business entity whose primary purpose is to affect competition.

An analysis of the application of antitrust laws would be incomplete without a survey of the precedents. There is apparently only one case in which the Sherman Act has been applied to a consumer boycott.[94] The Council of Defense for the State of New Mexico called for the public to cease buying publications of the International Magazine Company because William Randolph Hearst, a major stockholder, published newspapers which contained much allegedly unpatriotic material. Evidence showed that the magazines were free of the offensive material and that the Hearst papers had a very small ciculation in the state. The Governor and other state officials who made up the Council were found guilty of a conspiracy in violation of the Sherman Act.

One case in which a boycott was held violative of state antitrust law should be discussed. On December 5, 1955, a boycott of the city buses of Montgomery, Alabama, was begun by black citizens.[95] The boycott was originally a protest against the arrest of Mrs. Rosa Parks, who had refused to give up her seat when the bus driver wanted to move the racial divider farther back in the bus. Mrs. Park's spontaneous action was to have great import for the blacks of Montgomery and other cities who had ridden segregated buses all of their lives. The boycott which followed that arrest was led by the Reverend Martin Luther King, Jr. and other ministers of Montgomery. At first the demands were for courteous treatment, seating on a first-come first-served basis, and hiring black drivers for some routes. These soon became a general demand for desegregation of the buses.[96]

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[94] Council of Defense for the State of New Mexico v. International Magazine Co., 267 F. 390 (8th Cir. 1920).

[95] New York Times, Feb., 22, 1956, at 1, col. 6.

[96] Sibley, *Direct Action and the Struggle for Integration*, 16 HASTINGS L. REV. 351, 372-73 (1965).

Under the tort theory just discussed the boycott was on its face illegal. Desegregation of buses was not a legal objective until the decision, coming out of the Montgomery situation, in *Gayle v. Browder.*[97] Further, to force the Montgomery bus company to desegregate would have forced them to break the Alabama law requiring segregated seating.

Action was brought by the State of Alabama against King and 114 others under authority of section 54 of the 1923 Alabama Code, a 1921 act originally designed to deal with labor unions.[98] All were convicted.[99] The appeal was dismissed for procedural reasons; one can only speculate as to what the Supreme Court of Alabama would have done with the merits. The constitutional issue of free speech was not considered.

At least one earlier case indicates that state regulations on restraint of trade do not violate constitutional rights. Justice Black wrote in *Gibboney v. Empire Storage and Ice Co.*:

> We hold that a state's power to govern in this field is paramount, and that nothing in the constitutional guaranties of speech and press compels a state to apply or not to apply its anti-trade-restraint laws to groups of workers, businessmen, or others.[100]

Whether this idea would have held the day at a time when desegregation of public facilities was just beginning cannot be predicted. Even though the first of the important anti-discrimination boycotts resulted in convictions for restraint of trade, it is erroneous to conclude that this is a valid way to deal with such boycotts.

The lack of precedent, the problems involved in applying antitrust law, particularly the Sherman Act, and primarily the difference in objectives of the commercial and non-commercial boycott, lead one to believe that the application of antitrust law to consumer boycotts is not imminent, if likely at all.[101] The conclusion is not unassailable, however, particularly if a consumer boycott can be shown to have an effect on competition that outweighs the importance of the objectives of the boycott.

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[97] 352 U.S. 903 (1956).

[98] New York Times, Feb. 22, 1956, at 1, col. 6.

[99] *Id.*, Mar. 23, 1956, at 1, col. 2.

[100] 336 U.S. 490,504 (1949).

[101] The objectives of antitrust law listed in the Attorney General's National Committee Report on the Antitrust Law (1955) omit any threat to competition from any groups other than businessmen. Reported in Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW. U.L. REV. 705, 707, n.9 (1962).

V. A Recent Case in Mississippi

On October 12, 1970, the Supreme Court of Mississippi affirmed a decision of the Circuit Court of Grenada County, holding the Southern Christian Leadership Council and other citizens of Grenada, Mississippi, liable for damages to A.G. Corporation, a local grocery business.[102] Defendants had been charged with illegal conspiracy and secondary boycott, the malicious intent of which was to ruin and cause injury to the plaintiff's business. The complaint was varied and detailed, but the Chancellor found that the main issue was conspiracy. The Supreme Court agreed.[103]

The Mississippi Supreme Court has used the following definition of conspiracy: "A sufficient definition of conspiracy is 'A combination of persons to accomplish an unlawful purpose or a lawful purpose unlawfully.' "[104] Of primary importance is the fact that there was evidence in the record, some rebutted and some not, that acts of coercion and intimidation were committed and threatened against members of the black community to force them to join the boycott. Such evidence has always been dispositive of boycott cases; it may be argued that discussion of the case should stop here. If this evidence is accepted as the sole basis for the decision, there can be no argument against the decision on the basis of precedent in many jurisdictions. There is language, however, which indicates that the Supreme Court would have found the defendants guilty of conspiracy without such evidence of coercion.

Although the Court stated: "Every member of this Court agrees with the Chancellor . . . that the defendants had the right to peacefully meet, picket, march, and boycott to secure redress of their grievances and complaints specifically made against particular employers or businesses,"[105] that statement was qualified by the Court's decision that the defendants had no grievance against the complainant. The defendants, in fact, asserted a very real grievance: discriminatory hiring practices. Complaint had been made to the city of Grenada along with a list of other grievances several weeks before the boycott began. It is unrealistic to assert that plaintiff did not know what the grievance was, especially after the boycott began. At no time did the plaintiff attempt to discuss grievances with the boycotters; he preferred to go out of business.

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[102] SCLC v. A.G. Corp., 241 So.2d 619 (Miss. 1970).

[103] *Id.* at 624, 629.

[104] 15 C.J.S. *Conspiracy* § 1 at 996; Mississippi Power and Light Co. v. Town of Coldwater, 234 Miss. 615, 636, 106 So.2d 375, 381 (1958).

[105] SCLC v. A.G. Corp., 241 So.2d 619, 624 (Miss. 1970).

Further, a recent federal court decision in Mississippi indicates that specific grievances against targets are not necessary for a lawful boycott.[106] The Shelby County Educational Committee was protesting actions of the local school board. The protest began as a black boycott of public schools, but was extended to a boycott of the local merchants. The court enjoined only that picketing on private property and inside stores. Discussing lawful purpose, the court made this statement:

> Peaceful picketing for the object of expressing dissatisfaction with the actions of the school board of Shelby which constitutes a public question, might properly be made by these plaintiffs and all the members of the class they represent. That right of protest would go to any citizen of Shelby, whether he was engaged in the mercantile business or not, and so long as it remained peaceful persuasion—so long as it was an effort only to get another by peaceful means to agree and to adhere to the program—the law would recognize that to be the exercise of constitutional rights by these plaintiffs. This court recognizes that picketing in and of itself, where peacefully done for a public purpose in the exercise of constitutional rights . . . is lawful.[107]

The Grenada boycott protested general discrimination against blacks. This is a public question. All of the citizens of Grenada who supported discriminatory policies, or who were in a position to use influence to end discrimination, were proper objects of a boycott according to the public question doctrine. The Mississippi Supreme Court apparently does not accept this theory; certainly it is not bound to at this time.

The *S.CL.C.* decision does offer two important guidelines for prospective Mississippi boycotters: make a specific complaint to each object of the boycott and keep promotional activities completely free of coercive tactics. It is not clear, however, what standards will govern the lawfulness of purpose of the boycott.

VI. Conclusion

Consumer boycotts are not a new economic force, but their recent use in attempts to end racial discrimination raises some important questions. Mississippi businesses have been, and continue to be, the targets of consumer boycotts, creating a special need for knowledge of applicable law in this area. The present state of the law definitely favors the boycotters and leaves the merchant little choice but to suffer or negotiate. This situation is probably the result of the great emphasis

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[106] Dorsey v. Morrison, # DC 6821 (N.D. Miss. Order of May 31, 1968).
[107] *Id.*

traditionally placed on freedom of expression. Rare is the tort case that does not discuss this concept. The failure of the government to lead the way in using the Sherman Act against boycotts is surely influenced by the fact that protest with intent to change certain noncommercial conditions, rather than to affect competition, is the primary object of the consumer boycott.

To this writer the prevailing favoritism toward boycotters seems a good thing. Consumer boycotts almost always involve some group as boycotters whose individual members have no power alone to combat the power of economic entities to ignore the wishes of the consumer. No business has a right to stay in business if it adheres to policies, whether concerning pricing or hiring or any other everyday practice, which is so offensive to a portion of the public that the public will stay away and thereby destroy that business.

For those who disagree, changing the present situation is not impossible. Free speech, especially that accompanied by other activity, has always been limited by certain needs of the society that outweigh the importance of individual freedom. Such a change, however, appears to be a task for a very creative lawyer.

Ina Leonard

EVANS V. ABNEY:[1] PERMISSIBLE JUDICIAL FACILITATION OF PRIVATE DISCRIMINATION

I. Introduction

The unconstitutionality of racially restrictive covenants in property transfers has been settled for over twenty years.[2] It is also settled that a co-covenantor cannot sue for breach of the racially restrictive covenant.[3] There are other types of racial restrictions that are not as constitutionally certain as the racial covenant. A reverter which is a racially restrictive condition subsequent in a fee simple determinable has received at least two interpretations in the state courts.[4] The threshold question is: did the action of the judiciary in interpreting the deed sufficiently involve the state to bring the private discrimination within the requirements of the Equal Protection Clause of the fourteenth amendment? There would seem after *Shelley* little doubt that a positive act by the state judiciary which serves to effectuate private discrimination is prohibited.[5] The question *Evans v. Abney*[6] may have answered is to what extent the state judiciary may decline to act, when the declension serves to facilitate private discrimination. When will the judicial facilitation of private discrimination create sufficient state action for the Supreme Court to regard the state court's decision as unconstitutional?

The United States Supreme Court has developed the concept of state action[7] to determine if specific activities are subject to the restrictions of the fourteenth amendment. Since individuals can act unconstitutionally under the thirteenth or twenty-first amendment,[8] private discrimination, unless aided in some way by the state, is not within the purview of the fourteenth amendment. The Supreme Court has said:

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[1] 396 U.S. 435 (1970).

[2] Shelley v. Kraemer, 334 U.S. 1 (1948).

[3] Barrows v. Jackson, 346 U.S. 249 (1953).

[4] *Compare* Capital Fed. Sav. and Loan Ass'n v. Smith, 136 Colo. 265, 316 P.2d 252 (1957), *with* Charlotte Park & Recreation Comm'n v. Barringer, 242 N.C. 311, 88 S.E.2d 114 (1955), *cert. denied*, 350 U.S. 983 (1956). For a discussion of the two cases and Shelley v. Kraemer as applied to the reverter *see* Sams, *Application of the Doctrine of Shelley v. Kraemer to the Determinable Fee*, 33 Miss. L.J. 200 (1962).

[5] *Cf.* Clifton v. Puente, 218 S.W.2d 272 (Tex. Civ. App. 1948).

[6] 396 U.S. 435 (1970).

[7] For a discussion of the State action concept *see* Lewis, *The Meaning of State Action*, 60 Colum. L. Rev. 1083 (1960).

[8] Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 Cornell L.Q. 375, 411 (1958). *Cf.* Jones v. Alferd H. Mayer Co., 392 U.S. 409 (1968).

> [I]t cannot be disputed that under our decisions 'private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it.'[9]

The crucial question is always whether the state is sufficiently involved in encouraging, enforcing or permitting private acts that would be unconstitutional if done by the state.

The Supreme Court has not devised a definition that eliminates confusion on what exactly constitutes state action. The Court has resorted to rules that admit the difficulty of the determination:

> Only by sifting facts and weighing circumstances can the nonobvious involvement of the State . . . be attributed its true significance.[10]

The California Supreme Court in *Mulkey v. Reitman*[11] suggested several factors to consider in determining whether state action is present: (1) "immediate objective," (2) "ultimate effect," and (3) "historical context."[12] The United States Supreme Court readily accepted the test.[13] Unfortunately, there is an absence of certainty as to the circumstances in which the test is applicable.

The United States Supreme Court in *Evans v. Abney*[14] affirmed a Georgia Supreme Court decision[15] that allowed a one hundred acre tract of land, used as a park for fifty years under a testamentary charitable trust, to revert to the heirs of the testator. In 1966 the United States Supreme Court in *Evans v. Newton*[16] had ruled that private trustees could not be substituted to operate the park for whites only;[17] therefore, the park could not be operated on a segregated basis as requested by the testator. Confronted with the choice of allowing the park to be operated on an integrated basis, regardless of the racial restrictions imposed by the testator, or of finding no general charitable intent in the will, thereby allowing the property to revert to the heirs, the Georgia court decided for the heirs.[18]

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[9] Peterson v. City of Greenville, 373 U.S. 244, 247 (1963).

[10] Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

[11] 64 Cal. 2d 529, 413 P.2d 825 (1966).

[12] *Id.*

[13] Reitman v. Mulkey, 387 U.S. 369 (1967).

[14] 396 U.S. 435 (1970).

[15] Evans v. Abney, 224 Ga. 826, 165 S.E.2d 160 (1968).

[16] 382 U.S. 296 (1966).

[17] *Id.* There is some confusion on just what was decided. *See* Parker, *Evans v. Newton and the Racially Restricted Charitable Trust*, 13 How. L.J. 223 (1967).

[18] Evans v. Abney, 224 Ga. 826, 165 S.E.2d 160 (1968).

The potential effect of the decision on constitutional controversies involving private racial restrictions indicate the decision in *Evans v. Abney*[19] merits close attention. The explicit limitation of *Shelley v. Kraemer*[20] in the opinion, converse to the expectations of many scholars,[21] further enhances the importance of this decision. The Supreme Court seemed to suggest that if apparent judicial facilitation of private discrimination is not accompanied by patent racial animus, there is not sufficient state action,[22] unless as in *Shelley v. Kraemer*[23] and *Barrows v. Jackson*,[24] the right to acquire real property is threatened directly or indirectly. Framed as a confrontation between the states' right to determine property law and the Equal Protection Clause of the fourteenth amendment, the decision in *Evans v. Abney*[25] apparently answers several constitutional questions, only a few of which will be briefly considered in this note.

The problems presented in *Evans v. Abney*[26] demanded a detailed presentation of the facts and the prior litigation.

II. Background

A. *Facts*

In 1911 United States Senator Augustus Octavius Bacon devised in trust property known as Baconsfield—the park in question—income from other real property and bonds for the maintenance of Baconsfield for the benefit of his wife and two daughters for life. Upon the death of the last survivor, the will provided that the property, including all reversions and remainders,

> [S]hall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust for the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon to be by them forever used and enjoyed as a park and pleasure ground, subject to the restrictions, government, management, rules and control[27]

of a board of managers to be appointed by the City Council. The

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[19] 396 U.S. 435 (1970).

[20] 334 U.S. 1 (1948).

[21] *See, e.g.*, Henkin, *Shelley v. Kraemer: Notes For a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Weschler*, 108 U. PA. L. REV. 1 (1959).

[22] Evans v. Abney, 396 U.S. 435, 446 (1970).

[23] 334 U.S. 1 (1948).

[24] 346 U.S. 249 (1953).

[25] 396 U.S. 435 (1970).

[26] *Id.*

[27] Evans v. Newton, 220 Ga. 280, 281, 138 S.E.2d 573, 574 (1964).

Senator expressed an affection for the Negro race, but his particular social philosophy dictated that "in their social relations the two races . . . should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common."[28] The will also established a trust for other residuary beneficiaries; beneficiaries who would sixty years later acquire one hundred acres of property in the middle of Macon, Georgia, partially as a result of two United States Supreme Court rulings.

In 1920, the City purchased the life estate in Baconsfield from Senator Bacon's surviving daughter. The City agreed to pay the daughter $1,665.00 yearly for life and expend $650.00 annually for the improvement of the park.[29] The City ultimately spent $46,000.00 under this agreement. During the 1930's employees of the Works Progress Administration, a federal agency, devoted the better part of a year to transforming Baconsfield from a wilderness into a park.[30] Subsequent capital improvements were made with federal and city funds. The property enjoyed a tax exempt status for fifty years.[31] Maintenance was paid for in part by bonds left in trust by Senator Bacon; however, the City spent additional thousands of dollars a year on the park.[32]

For years the City operated the park for whites only. In the early 1960's the City, after several pertinent United States Supreme Court decisions,[33] allowed Negroes to use the facilities.

B. *Prior Litigation*

After the park was integrated, the Board of Managers brought an equitable petition against the City of Macon and the successor trustees under Senator Bacon's will of certain assets held for the benefit of residuary beneficiaries. The Board of Managers prayed that the City be removed as trustee and another trustee appointed to execute the explicit conditions of the trust—operate a segregated recreational area —and that members of the Negro race be permanently enjoined from using Baconsfield. The trustees for the residuary beneficiaries, Guyton Abney and others, asked that the relief sought by the Board of Managers be granted, but if the relief was not granted, that the property revert to the heirs.

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[28] Evans v. Abney, 396 U.S. at 442.

[29] Evans v. Abney, 224 Ga. at 831, 165 S.E.2d at 165.

[30] Evans v. Abney, 396 U.S. at 451 (dissenting opinion).

[31] *See, e.g.*, GA. CONST., art. VII, § I (IV) (legislature permitted to exempt charitable institutions); GA. CODE ANN. §§ 92-130, 92-201 (Supp. 1970); 92-3105 (c), 92-3109 (g) (1961).

[32] Evans v. Abney, 396 U.S. at 451 (dissenting opinion).

[33] *See, e.g.*, Watson v. City of Memphis, 373 U.S. 526 (1963).

Reverend E. S. Evans and other Negro residents of Macon intervened. The Negro intervenors asserted that the court as an agency of the state could not appoint private trustees for the purpose of operating the park in a racially discriminatory manner under the Equal Protection Clause of the fourteenth amendment. The Bibb County Superior Court appointed private trustees.[34] The Georgia Supreme Court affirmed.[35] The United States Supreme Court reversed the decision of the Georgia court,[36] holding Baconsfield subject to the fourteenth amendment.[37] The tradition of municipal control and the proof of the purpose for substituting trustees was sufficient to subject the park to the Equal Protection Clause.[38] The Georgia Supreme Court, on remand, instructed the Bibbs County Superior Court that the trust had failed.[39] The Bibbs County Superior Court entered a summary judgment holding the trust had failed and the property reverted to the heirs. The Negro intervenors appealed to the Georgia Supreme Court. The Georgia court affirmed the decision of the Bibbs County Superior Court.[40] Reverend Evan's appeal to the United States Supreme Court was unsuccessful.[41] The residuary beneficiaries under Senator Bacon's will acquired one hundred acres in downtown Macon—a windfall generated in part by the United States Supreme Court.

III. The Opinion of the Georgia Supreme Court

The majority opinion of the United States Supreme Court in *Evans v. Abney*[42] insisted that there was no racial animus on the part of the Georgia court.[43] The Georgia court was, according to Justice Black, applying "well settled . . . principles of [state] law."[44] In view of the reliance of the majority on the application of "well settled principals" and the implication that if the intent to discriminate was patent in the opinion of the Georgia court, sufficient state action might have been present to justify reversal, a brief analysis of the Georgia court's decision seems appropriate. A perfunctory investigation of the holding of the Georgia court suggests that the opinion merits a thorough critical examination. This note, however, is only concerned with the

[34] Newton v. City of Macon, 9 Race Rel. L. Rep. 309 (Bibb County Superior Ct., Ga. 1964).

[35] Evans v. Newton, 220 Ga. 280, 138 S.E.2d 573 (1964).

[36] Evans v. Newton, 382 U.S. 296 (1966).

[37] *Id.*

[38] *Id.*

[39] Evans v. Newton, 221 Ga. 870, 148 S.E.2d 329 (1966).

[40] Evans v. Abney, 224 Ga. 826, 165 S.E.2d 160 (1968).

[41] Evans v. Abney, 396 U.S. 435 (1970).

[42] *Id.*

[43] *Id.* at 445.

[44] *Id.* at 439.

obviousness and number of alternatives presented to a state court before there is state action rather than "neutral application" of "well settled principals."

A. *Cy Pres*[45]

The Bibbs County Superior Court refused to apply cy pres to save the trust. The Supreme Court of Georgia approved the decision.[46] Cy press is defined by Professor Scott as follows :

> Where property is given in trust for a particular charitable purpose, the trust will not ordinarily fail even though it is impossible to carry out the particular purpose. In such a case the court will ordinarily direct that the property be applied to a similar charitable purpose. The theory is that the testator would have desired that the property be so applied if he had realized that it would be impossible to carry out the particular purpose. The Courts usually put it this way, that although the testator intended that the property should be applied to the particular charitable purpose named by him, yet he had a more general intention to devote the property to charitable purposes. The settlor would presumably have desired that the property should be applied to purposes as nearly as may be like the purposes stated by him rather than have the trust fail altogether.[47]

At common law, cy pres was applied by the King, prerogative cy pres, as well as the Chancellor, judicial cy pres.[48] The king exercised prerogative cy pres by indicating in writing over his signature—his sign manual—the purpose for which the property would be used. The arbitrary nature of the royal prerogative is apparent in the often cited case of *Da Costa v. De Pas.*[49] In *Da Costa,* a Jewish testator requested that a trust be established to teach Jewish law and the Jewish religion. In 1754, when the case was decided, a charitable gift to a religion other than the established religion was illegal. The Chancellor ruled that there was a charitable intent; therefore, the trust should not fail. The disposition of the property was left to the sovereign. The King, by his sign manual, directed that the property be used to support an instructor to teach the Christian religion to the children in the founding hospital. Prerogative cy pres, unless possibly exercised by the legislature, is not in effect in the United States.[50]

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[45] For an analysis of the doctrine of cy pres, or the absence of the doctrine, in Mississippi *see* Comment, *The Doctrine of Cy Pres—Its Need in Mississippi,* 30 Miss. L.J. 301 (1959).

[46] Evans v. Abney, 224 Ga. 826, 165 S.E.2d 160 (1968).

[47] 4 A. Scott, The Law of Trust § 399, at 3084 (3d ed. 1967).

[48] *Id.* § 399.1 at 3089.

[49] 1 Amb. 228, 2 Swanst. 487 (1754).

[50] 4 A. Scott, *supra* note 47, § 399.1 at 3092.

The doctrine of judicial cy pres is accepted by most states.[51] Georgia has embodied the doctrine of cy pres in statutory form.

> When a valid charitable bequest is incapable for some reason of execution in the exact manner provided by the testator, donor, or founder, a court of equity will carry it into effect in such a way as will as nearly as possible effectuate his intention.[52]

> A devise or bequest to a charitable use will be sustained and carried out in this State; and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it to be done shall fail from any cause, a court of chancery may, by approximation, effectuate the purpose in a manner most similar to that indicated by the testator.[53]

If the court finds there was no general charitable intent, the doctrine of cy pres is not applicable.

> It is not true that a charitable trust never fails where it is impossible to carry out the particular purpose of the testator. In some cases . . . it appears that the accomplishment of the particular purpose and only that purpose was desired by the testator and that he had no more general charitable intent and that he would presumably have preferred to have the whole trust fail if the particular purpose becomes impossible of accomplishment. In such a case the cy pres doctrine is not applicable.[54]

The Georgia Supreme Court ruled that Senator Bacon did not have a general charitable intent; therefore, cy pres could not be used to save the trust.[55] Although many jurisdictions under similar circumstances have found a general charitable intent,[56] the interpretation of the Senator's intent in view of *Evans v. Abney*[57] was undoubtedly the exclusive prerogative of the Georgia courts. The failure of the Georgia court to apply cy pres to save the trust was apparently arbitrary. Arbitrariness, perhaps even contrariness, will not suffice to provide sufficient

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[51] *Id.* § 399.2 at 3094.

[52] GA. CODE ANN. § 108-202 (1959).

[53] GA. CODE ANN. § 113-815 (1958).

[54] 4 A. SCOTT, *supra* note 47, § 399 at 3085. Many courts have found that the naming of a municipality trustee is evidence of a general charitable intent, *see* G. BOGERT, TRUST AND TRUSTEES, § 437 (2d ed. 1964). Professor Scott cites La Fond v. City of Detroit, 357 Mich. 362, 98 N.W.2d 530 (1959) as a case where no general charitable intent was found. The facts in *La Fond* and Evans v. Abney are similar, except the Michigan court refused to apply cy pres at the outset, not fifty years after the will was probated.

[55] Evans v. Abney, 224 Ga. 826, 165 S.E.2d 160 (1968).

[56] *See. e.g.*, Coffee v. William Marsh Rice Univ., 408 S.W.2d 269 (Tex. Civ. App. 1966); Howard Savings Institution v. Peep, 34 N.J. 494, 170 A.2d 39 (1961).

[57] 396 U.S. 435 (1970).

evidence of state action to invoke a Supreme Court reversal in the sensitive area under consideration.

From the point of view of some citizens of Macon it may be unfortunate that some Georgia judge could not have said of Senator Bacon what Circuit Judge McLaughlin said of Stephen Girard under similar circumstances.

> [G]iven everything we know of Mr. Girard, it is inconceivable that in this changed world he would not be quietly happy that his cherished project had raised its sights with the times and joyfully recognized that all human beings are created equal.[58]

B. *The Reversion*

Upon the failure of a charitable trust, the Georgia Code provides that the property shall revert to the heirs.[59] The statute does not restrict the alienability of the reversionary interest.[60] Senator Bacon devised to the city all reversionary interest in Baconsfield. The Georgia court said that by "all reversions and remainders" Senator Bacon referred to reversions and remainders prior to the vesting of the legal title in the city.[61] The interest following the life estates devised in the will were certainly remainders. A reversion, construing the provisions of Senator Bacon's will as a whole,[62] would only be effective on the occurrence of an unforeseen event. Since the Georgia court credited the Senator's social views as so precisely stated that they were not subject to modification fifty years later, it would seem that his legal terminology—he was a lawyer—deserved to be interpreted equally as precisely. If Senator Bacon wished the City, in any event, to hold all interest in the property, he could do little more than devise "all reversions" to the city. The Georgia Supreme Court implied that the city could have bought the reversionary interest at the time of purchasing the life estate in 1920 from Senator Bacon's surviving daughter.[63] A purchase of "all reversionary interest" from the holder of a life estate is difficult to distinguish from a devise of the reversionary interest from a testator.

C. *Laches*[64]

The question arises that if, as Justice Douglas said in his dis-

[58] Pennsylvania v. Brown, 392 F.2d 120, 125 (3d Cir. 1968).

[59] GA. CODE ANN. § 108-106 (4) (1959).

[60] A reversionary interest is alienable in Georgia. *See* William v. Thomas County, 208 Ga. 103, 65 S.E.2d 412 (1951).

[61] Evans v. Abney, 224 Ga. at 831, 165 S.E.2d at 165 (1968).

[62] Yerby v. Chandler, 194 Ga. 263, 21 S.E.2d 636 (1942).

[63] Evans v. Abney, 224 Ga. at 831, 165 S.E.2d at 165 (1968).

[64] The Georgia Code specifically provides for the use of laches. *See* GA. CODE ANN. §§ 3-712, 3-713 (1961). (*See* note 70 *infra*).

senting opinion in *Evans v. Abney*,[65] the creation of the park was unconstitutional in 1911 under the "separate but equal doctrine" of *Plessey v. Ferguson*,[66] what was the effect of a half century delay by the heirs in asserting their claim? In *Baker v. Baker*[67] the Georgia court held that a cause of action under a trust would not be allowed after a delay of forty-three years.[68] A thirty-six year delay was held too long in *Basch v. Frankenstein*.[69] In these cases the doctrine of laches was applied. Laches may be simply defined as an equitable limitation of a cause of action, if equities other than mere delay are present. The Georgia Code provides for use of laches under circumstances not provided for by statutes of limitation.[70]

If the cause of action of the residuary legatees did in fact arise at the death of Senator Bacon, under *Plessey v. Ferguson*,[71] then the delay by anyone claiming as heirs of Senator Bacon may have been worth considering. The issue, if presented as simply balancing equities between the delay and the interest of the heirs, would seem readily resolved. The equities in saving a hundred acre park for the people of Macon used as a recreation facility for fifty years, cannot be balanced with a doubtful claim asserted by residuary beneficiaries after a fifty year delay.

D. *The Georgia Statute Providing For Reversion*

The Georgia Code provides that a resulting trust is implied for the grantor, or the heirs of a testator if an express trust fails.[72] The Georgia court cited the Code as authority for allowing the property to revert to Senator Bacon's heirs.[73] In effect, section 108-106[74] as interpreted by

[65] Evans v. Abney, 396 U.S. at 448 (dissenting opinion).

[66] 163 U.S. 537 (1896).

[67] 134 Ga. 138, 67 S.E. 541 (1910).

[68] *Id.*

[69] 134 Ga. 518, 68 S.E. 75 (1910).

[70] GA. CODE ANN. § 3-712 (1961) provides:

> Limitations in equity; laches. —The limitations herein provided shall apply equally to all courts; and in addition to the above, courts of equity may interpose an equitable bar, whenever, from the lapse of time and laches of the complaintant, it would be inequitable to allow a party to enforce his legal rights.

GA. CODE ANN. § 3-713 (1961) is as follows:

> Limitations as to trusts. —Subsisting trusts, cognizable only in a court of equity, are not within the ordinary statutes of limitation; but in all cases equity will consider the lapse of time in decreeing an account, and where, from it and other circumstances, it would be inequitable, any relief will be refused.

[71] 163 U.S. 537 (1896).

[72] GA. CODE ANN. § 108-106 (4) (1959).

[73] Evans v. Abney, 224 Ga. at 828, 165 S.E.2d at 163 (1968).

[74] GA. CODE ANN. § 108-106 (1959).

the Georgia court and applied in *Evans v. Abney*,[75] allowed property to revert to heirs, because the racial restrictions of the testator could not be given further effect. Is the utilization of a state statute by a state court to facilitate private discrimination distinguishable from the state action test in *Reitman v. Mulkey*?[76] The United States Supreme Court has said that a state violates the Equal Protection Clause when it singles out racial discrimination for encouragement.[77] It cannot be controverted that the Georgia court used a Georgia statute to prevent a park from being operated on an integrated basis.

E. *Summary of the Georgia Court's Decision*

The Georgia courts found that Senator Bacon did not have a general charitable intent; therefore, cy pres was not available to save the trust. The interpretation of Senator Bacon's intent is not subject to considered criticism. Georgia law, as interpreted by Georgia judges, was applied. Many jurisdictions, undoubtedly, would have found a general charitable intent and applied cy pres.[78] Yet, it can scarcely be argued, that racial animus is evident from the interpretation of Senator Bacon's will.

The failure of the Georgia court to find that laches would prevent the heirs from claiming the property, or that the city held the reversionary interest from 1911, may suggest the Georgia Supreme Court did not weigh very heavily the policy of destroying a hundred acre park and the special favor charitable trusts are usually afforded;[79] yet patent racial animus is not present in the opinion. The availability of equitable remedies to save the park are apparent. The Georgia courts declined to recognize the applicability of any theory. If the action of the Georgia court was less than aggressive in attempting to avoid a forfeiture, the decision of the United States Supreme Court was even more negative in the failure to rectify the results of a previous opinion.

IV. Opinion of the United States Supreme Court

A. *The Issues Presented*

In the opinion for the majority, Justice Black indicated that the issue in *Evans v. Abney*[80] was whether a state court could refuse to apply cy pres to save a charitable trust even if refusal would terminate the trust. Justice Black's view on a state court's prerogatives in determin-

[75] 224 Ga. 826, 165 S.E.2d 160 (1968).
[76] 387 U.S. 369 (1967).
[77] *Id.* at 376.
[78] *See* cases cited note 56 *supra*.
[79] *See* G. Bogert, Trust and Trustees §§ 394-417 (2d ed. 1964).
[80] 396 U.S. at 439.

ing the distribution of the corpus of a charitable trust that failed were made perfectly clear in his dissent in *Evans v. Newton*:[81]

> The ambiguous language used by the Court even casts doubt upon Georgia's power to hold that the trust property here can revert to the heirs of Senator Bacon if the conditions upon which he created the trust should become impossible to carry out. The heirs of Senator Bacon raised the issue of reversion below, but neither court reached it. So far as I have been able to find, the power of a State to decide such a question has been taken for granted in every prior opinion this Court has ever written touching this subject. I believe that Georgia's complete power to decide this question is so clear that no doubt should be cast on it as I think the Court's opinion does. But if this Court is to exercise jurisdiction in this case and hold, despite the fact that the state court's decree did not adjudicate any such question, that the new successor trustees cannot constitutionally operate the park in accordance with Senator Bacon's will, then I think that the Court should explicitly state that the question of reversion to his heirs is controlled by state law and remand the case to the Georgia Supreme Court to decide that question.[82]

Without doubt, a state court may exercise the power to determine the manner in which property may be transmitted by will or inheritance,[83] unless the state court's disposition of the property is in violation of the Supremacy Clause,[84] or, more basically stated, unless there is a compelling federal interest involved.

If *Evans v. Abney*[85] is viewed as a confrontation between an individual's discriminatory disposition of private property enforced by a state court, and another individual's claim of a constitutional right being violated by the state court's action, then criticism of the opinion of the majority would be spurious. If merely a state law on inheritance or conveyances were the basis of the private discrimination, every imagin-

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[81] 382 U.S. 296 (1966).

[82] *Id.* at 314 (dissenting opinion.)

[83] *See, e.g.*, Mager v. Grima, 49 U.S. (8 How.) 490 (1850).

[84] *See* Havenstein v. Lynham, 100 U.S. 483 (1880) (disposition of property under state statutes in violation of a treaty); *cf.* Omaya v. California, 332 U.S. 633 (1948), in which Justice Black stated in a concurring opinion:

> If there is any one purpose of the fourteenth amendment that is wholly outside the realm of doubt, it is that the Amendment was designed to bar States from denying to some groups, on account of their race or color, any rights, privileges, and opportunities accorded to other groups. I would now overrule the previous decisions of this court that sustained state land laws which discriminate against people of Japanese origin residing in this country. *Id.* at 649.

[85] 396 U.S. 435 (1970).

able act would be within the concept of state action.[86] There must be sufficient government involvement plus something more. The necessity of finding not only governmental action, but "governmental action in a context of sufficiently grave social implications to persuade the Supreme Court of the necessity of federal correction,"[87] prevents abrasive interference in state matters by the federal judiciary. The policy of avoiding friction rather than producing it, the balancing of the states' interest against the gravity of the harm to the particular constitutional right claimed, seems to support Professor Clark's conclusion that there must also be grave social implications.[88]

A state probating a will with a restriction on religion as a condition to taking, would apparently not justify the Supreme Court overruling a state court.[89] The enforcement of a contract clause by a state court that restricts freedom of association would fail to meet the test of serious social implications.[90] The federal courts will always, even in federal question cases, attempt to apply state law in certain areas. Among the topics which federal courts prefer to leave to the states are property law, family law, and laws of descent and distribution.[91] The friction avoiding policy necessitates a presumption of the integrity of state judges.

The problems presented in *Evans v. Abney*[92] clearly test this policy. Even in the areas of property law, the guidelines may be assumed to be:

> However undesirable it may be for courts to invoke federal power to stay action under state authority, it was precisely to require such interposition that the Fourteenth Amendment was adopted by the people of the United States. Its adoption implies that there are matters of fundamental justice that the citizens of the United States consider so essentially an ingredient of human rights as to require a restraint on action on behalf of any state that appears to ignore them.[93]

The standard for determining if there was improper application

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[86] *See*, Comment, *The Impact of Shelley v. Kraemer on the State Action Concept*, 44 CALIF. L. REV. 718 (1956).

[87] Clark, *Charitable Trust, The Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979, 1002 (1957).

[88] *Id.*

[89] *Cf.* Gordon v. Gordon, 322 Mass. 197, 124 N.E.2d 228, *cert. denied*, 349 U..S 947 (1955).

[90] Black v. Cutter Laboratories, 351 U.S. 292 (1956).

[91] *See, e.g.*, Uterhart v. United States, 240 U.S. 598, 603 (1916).

[92] 396 U.S. 435 (1970).

[93] Orleans Parish School Bd. v. Busa, 242 F.2d 156, 166 (5th Cir. 1957).

of neutral state laws in fourteenth amendment controversies is well settled:

> The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.[94]

In a concurring opinion in *Snowden v. Hughes*[95] Justice Frankfurter said:

> The Constitution does not assure uniformity of decisions or immunity from merely erroneous action, whether by the courts or the executive agencies of a state. . . . [A] departure from a norm must be rooted in design and not derive merely from error or fallible judgment.[96]

If *Evans v. Abney*[97] actually presented a viable constitutional controversy, something more than mere state court error must be present.

It is submitted that several factors other than the "neutral application" of "well settled state law" were present in *Evans v. Abney*.[98] A testator invoked state aid to implement his discriminatory design. The state legislature had encouraged the particular disposition of property that resulted. The state had given Baconsfield a preferred, protected status for fifty years. The testator's plan had benefitted from his ability to avail himself of state support.

Justice Black's observation that the loss was suffered by both races and that discrimination was completely eliminated by destroying the park certainly cannot be an argument for the constitutionality of the Georgia court's decision. An early civil rights case involving separate seating on dining cars summarily dismissed the "both races suffer equally" argument:

> [D]iscriminations that operate to the disadvantage of two groups are not the less to be condemned because their impact is broader than if only one were affected.[99]

B. *Judicial Facilitation of Private Discrimination*

Justice Black saw no problem in distinguishing *Evans v. Abney*[100]

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[94] Snowden v. Hughes, 321 U.S. 1, 8 (1944).
[95] *Id.*
[96] *Id.* at 15 (concurring opinion).
[97] 396 U.S. 435 (1970).
[98] *Id.*
[99] Henderson v. United States, 339 U.S. 816, 825-26 (1950).
[100] 396 U.S. 435 (1970).

from *Shelley v. Kraemer*.[101] Contrary to the expectations of various writers who have suggested that *Shelley v. Kraemer*[102] should be interpreted as an absolute bar to judicial facilitation of private discrimination,[103] it is obvious that *Shelley v. Kraemer* must be read very narrowly. In fact "[a] majority of the Court has relied on *Shelley* but once"[104]—in *Barrows v. Jackson*.[105] *Shelley* prevents court enforced restraints on willing buyers and willing sellers.[106]

Chief Justice Vinson, who wrote the majority opinion in *Shelley v. Kraemer*,[107] had occasion, in his dissent in *Barrows v. Jackson*,[108] to reiterate what was decided in *Shelley*:

> [T]he question which we decided was simply whether a state court could decree the ouster of Negroes from property which they had purchased and which they were enjoying. We held that it could not. We held that such judicial action, which operated directly against the Negro petitioners and deprived them of their right to enjoy their property solely because of their race, was state action and constituted a denial of "equal protection."[109]

Barrows v. Jackson[110] decided a co-covenantor could not sue for violation of a racially restrictive covenant. *Barrows* and *Shelley* are both instances of the state courts' preventing or having a "chilling effect" on an individual's right to acquire property. In *Barrows* and *Shelley*, the state courts had to provide positive action to aid the attempted discrimination. There was more than neutral interpretation of state law.

If *Shelley v. Kraemer*[111] is read only as prohibiting state courts from restricting alienation of property for racial reasons, then clearly *Evans v. Abney*[112] is distinguishable.

Undoubtedly, an owner may deny use of his property. As has been pointed out by Professor Abernathy, private persons, except under

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[101] 334 U.S. 1 (1948).

[102] *Id.*

[103] *See, e.g.*, Henkin, *Shelley v. Kraemer: Notes For A Revised Opinion*, 110 U. PA. L. REV. 473 (1962).

[104] Nelkin, *Cy Pres and the Fourteenth Amendment: A Discriminating Look at Very Private Schools and Not So Charitable Trusts*, 56 GEO. L.J. 272, 301 (1967).

[105] 346 U.S. 249 (1953).

[106] Shelley v. Kraemer, 334 U.S. at 19.

[107] 334 U.S. 1 (1948).

[108] 346 U.S. 249 (1953).

[109] *Id.* at 261 (dissenting opinion).

[110] *Id.* at 249.

[111] 334 U.S. 1 (1948).

[112] 396 U.S. 435 (1970).

the thirteenth and twenty-first amendments, cannot act unconstitutionally, only illegally.[113] "[T]he fact that an owner denies the use of his property . . . does not make the assistance offered by the state a denial of the equal protection clause of the fourteenth amendment."[114] Apparently, a grantor in conveying property may restrict use, if not given to the state, but he cannot restrain alienation by covenant.[115]

C. *"Historical Context," "Ultimate Effect" and "Immediate Objective"*[116]

The historical "context" of Baconsfield is discussed in detail by Justice White in *Evans v. Newton*.[117] He noted the situation in Georgia in 1905 which encouraged Senator Bacon's discriminatory distribution of his property. The "immediate objective" of *Evans v. Abney*[118] was to close a "public"—as determined by *Evans v. Newton*—[119] park, because it could not be operated for whites only. The "ultimate effect" may well be that people with generous ancestors may be checking the phrasing of ancient deeds—particularly gifts to schools, hospitals and other public facilities.

Justice Black in writing for the majority in *Evans v. Abney*,[120] did not discuss *Reitman v. Mulkey*.[121] If nothing more than private discrimination were involved, the restriction on use by an owner of his property, then the various considerations in *Reitman v. Mulkey*[122] were not relevant. The testator in *Evans v. Abney*,[123] by invoking state aid in administering Baconsfield, did not stand in the same posture as a private land owner; therefore, *Reitman v. Mulkey*[124] was relevant.

D. *Privately Owned-Public Functions*

The United States Supreme Court has said that when the state allows private ownership of essentially governmental functions, the pri-

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[113] Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375, 409 (1958).

[114] *Id.* at 411.

[115] *See* Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 So. CAL. L. REV. 208, 213 (1957).

[116] Reitman v. Mulkey, 387 U.S. 369 (1967).

[117] 382 U.S. 296 (1966).

[118] 396 U.S. 435 (1970).

[119] 382 U.S. 296 (1966).

[120] 396 U.S. 435 (1970).

[121] 387 U.S. 369 (1967).

[122] *Id.*

[123] 396 U.S. 435 (1970).

[124] 387 U.S. 369 (1967).

vate owner will be subject, just as a state, to the fourteenth amendment.[125]

In *Marsh v. Alabama*[126] a privately owned town refused to allow distribution of religious literature without written permission. The Supreme Court held that whether privately owned or an agency of a state, a town is subject to the dictates of the Constitution. In his opinion for the Court, Justice Black said:

> [O]wership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.[127]

Senator Bacon invoked the aid of two Georgia statutes in creating the trust.[128] He willingly subjected the property to state court supervision.[129] The property would benefit from enforcement by the Attorney General.[130] Baconsfield was tax exempt.[131] The aid of the city in maintenance was assured by naming the city trustee.

The Supreme Court would not, by reversing the Georgia court, have been bringing private discrimination within the fourteenth amendment. Senator Bacon had opened his property to the public. His purpose was significantly enhanced by state aid; enhanced to an extent that would indicate a forfeiture of any private right to discriminate. *Marsh v. Alabama*,[132] *Terry v. Adams*[133] and *Commissioner of Public Utilities v. Pollak*[134] must at least mean that in some circumstances an owner of private property may become so involved in performing a state function that the public may fairly expect the same constitutional protection from the owner of the private property performing a public function, as they would from an agency of the state.

E. *The Charitable Trust and the Fourteenth Amendment*

Evans v. Newton[135] decided that Baconsfield for some purposes was

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[125] *See* Terry v. Adams, 345 U.S. 461 (1953); Public Util. Comm'r v. Pollak, 343 U.S. 451 (1952); Marsh v. Alabama, 326 U.S. 501 (1946).

[126] 326 U.S. 501 (1946).

[127] *Id.* at 506.

[128] GA. CODE ANN. §§ 69-504, 69-505, (1967).

[129] GA. CODE ANN. §§ 108-301 et seq. (1959).

[130] GA. CODE ANN. § 108-212 (Supp. 1970).

[131] Evans v. Abney, 396 U.S. 435 (1970) (dissenting opinion).

[132] 326 U.S. 501 (1946).

[133] 345 U.S. 461 (1953).

[134] 343 U.S. 451 (1952).

[135] 382 U.S. 296 (1966).

subject to the fourteenth amendment. Several scholars have suggested that all charitable trusts should be subject to the fourteenth amendment:[136]

> It would be incongruous if philanthropy, while operating with the helping hand of government and performing the same essential functions, was to be held to a lesser standard.[137]

Justice Douglas, in the opinion for the Court in *Evans v. Newton*, did not reach the question of to what extent all charitable trusts are to be governed by the fourteenth amendment. He said:

> If a testator wanted to leave a school or center for the use of one race only and in no way implicated the State in supervision, control, or management of that facility, we assume *arguendo* that no constitutional difficulty would be encountered.[138]

It is generally true that all charitable trusts enjoy tax exempt status; the Attorney General enforces the trust on behalf of the public; the courts supervise the administration of a charitable trust; the doctrine of cy pres or approximation may be used to insure that the trust does not fail. To some extent the state is always implicated in a charitable trust.

A charitable trust has a definite public character:

> While the human beings who are to obtain advantages from charitable trust may be referred to as beneficiaries, the real beneficiary is the public, and the human beings involved are merely the instrumentalities from whom the benefits flow.[139]

The United States Supreme Court from an early date accepted the public nature of a charitable trust. In a decision that reflects little respect for a literal interpretation of the first amendment, but considerable insight into the nature of charitable trusts, the Court said:

> [T]he property given to a charity becomes in a measure public property, only applicable as far as may be, it is true, to the specific purposes to which it is devoted, but within those limits consecrated to the public use. . . .[140]

In *Evans v. Newton*[141] the fourteenth amendment prevented a state court from performing an administrative detail—changing trustees—as

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[136] *See* Clark, *Charitable Trust, The Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979 (1957).

[137] *Id.* at 1010.

[138] Evans v. Newton, 382 U.S. at 300.

[139] *In re* Estate of Reshour, 185 Kan. 434, 441, 345 P.2d 689, 695 (1959).

[140] Morman Church v. United States, 136 U.S. 1, 59 (1889).

[141] 382 U.S. 296 (1966).

a denial of equal protection. In *Evans v. Abney*,[142] the state court was allowed to close the same park without violating the fourteenth amendment—a delicate distinction.

V. Conclusion

Although the question of whether a public park can be closed for entirely racial reasons has not been decided by the Supreme Court,[143] Justice Black in the opinion for the majority assumed, *arguendo*, that a state could not close a public park to prevent integration;[144] therefore, it is apparently safe to say that question was not what *Evans v. Abney*[145] decided. The closing of Baconsfield was precipitated by *Evans v. Newton*;[146] therefore, *Evans v. Abney*[147] cannot be construed as overruling *Evans v. Newton*.[148] Baconsfield was subject to the fourteenth amendment for certain purposes.

The result in *Evans v. Abney*[149] suggests that in some charitable trusts state action may be sufficient to prevent a state court from appointing private trustees; but the same state action and more may not be sufficient to prevent the same court from ending the charitable trust to prevent integration.

In determining if private conduct is involved sufficiently with the state, it seems that not only must the Court "weigh and sift" and determine if there are grave social implications, but also determine whether the gravity of state involvement and the social implications justify the decision in view of the level of intensity of the state action.

Shelley v. Kraemer,[150] *Barrows v. Jackson*[151] and *Reitman v. Mulkey*[152] were all decisions that protected, either directly or indirectly, a willing purchaser from buying from a willing seller. In essence the decisions protected the basic property right—the right to acquire property. *Evans v. Abney*[153] suggests that if the right to acquire property is not affected, the constitutional right violated must be more severe than a prospective loss of use of a park in order for the Supreme Court to

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[142] 396 U.S. 435 (1970).
[143] *But see* Griffin v. County School Bd., 377 U.S. 218, 231 (1964).
[144] Evans v. Abney, 396 U.S. at 445.
[145] 396 U.S. 435 (1970).
[146] 382 U.S. 296 (1966).
[147] 396 U.S. 435 (1970).
[148] 382 U.S. 296 (1966).
[149] 396 U.S. 435 (1966).
[150] 334 U.S. 1 (1948).
[151] 346 U.S. 249 (1953).
[152] 387 U.S. 369 (1967).
[153] 396 U.S. 435 (1970).

interfere with a state court's interpretation of a will and disposition of property under a will.

It may be that the Supreme Court, although not admitting a right to discriminate, views the control of property rights by states as more important than the loss of one park. In the ever present balancing of state and federal interests in Supreme Court decisions, as regrettable as the loss was, the decision seems the only course.

The policy considerations were for the Georgia courts to weigh. Once the Georgia court determined that the park should be destroyed, it was not for the United States Supreme Court to save one park at the risk of jeopardizing the integrity of the Georgia court.

It would seem that state courts may enforce ancient reverter clauses —the limitation being a racial restriction on use—even though the violation is caused by compliance with a United States Supreme Court decision, if the right to acquire property is not affected. If a group is prevented from purchasing, the reverter is unconstitutional; but if the reverter operates to prohibit use, it may be enforceable. The question remains unanswered whether a restraint on alienation on racial grounds, drafted as a limitation in a fee simple determinable, is permissible under *Shelley v. Kraemer*.[154] Even if not within the purview of the fourteenth amendment, *Jones v. Alfred H. Mayer Company*[155] raised the possibility that some private discriminatory practices are prohibited by the thirteenth amendment.

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[154] 334 U.S. 1 (1948).
[155] 392 U.S. 409 (1968).

STUDENT NOTES

Excessive Fine and the Indigent—An Historical Argument

I. *Introduction*

On June 22, 1970, the Supreme Court of the United States, in the case of *Williams v. Illinois*,[1] ruled that the Equal Protection Clause of the fourteenth amendment prevents a state from imprisoning an indigent beyond the maximum term specified by statute solely because of his inability to pay a fine and court costs.[2] In making the decision, however, the court expressly held:

> [A] state is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both fine and imprisonment for non-payment whereas other defendants must always suffer one or the other conviction.[3]

Recently the Supreme Court qualified *Williams v. Illinois*, holding that where a state has legislated a "fines only" policy for a particluar class of offenses, i.e. traffic offenses, the court cannot "limit the punishment to payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent defendant without the means to pay his fine."[4] The decision does not affect those statutes in which a prison term is provided; indeed, the decision may be subverted by the state should the legislature provide for a prison term for all misdemeanors.[5] Although the Supreme Court recommended that the states adopt alternative methods for collecting the fine imposed upon the indigent,[6] the spirit of this decision may be lost by the mere sweep of the legislators' pen.

In the long run, the indigent may be in no better position than he is under the Equal Protection Clause. Moreover, what of the instances

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[1] 339 U.S. 235 (1970).

[2] *Id.*

[3] *Id.* at 244.

[4] Tate v. Short, 39 U.S.L.W. 4301 at 4302 (U.S. March 2, 1971).

[5] Presumably Texas could avoid the decision by amending Tex. Code Crim. Proc. Ann. art. 4.14 (1966), granting the corporation court jurisdiction over cases in which punishment is by fine and/or imprisonment and amending Tex. Rev. Civ. Stat. art. 6701d § 193 (b) (1966) to provide a prison sentence for traffic offenses. Indeed, a state may avoid this decision by enacting a general statute, i.e., every person convicted of a misdemeanor for a violation of any of the provisions of this Code for which the penalty of imprisonment is not provided shall for first conviction thereof be either fined in accordance with the previous provisions thereof and/or be imprisoned for a term not to exceed one year. Should this fail, of course, the state could avoid the decision by amending each section for which imprisonment is not provided.

[6] Tate v. Short, 39 U.S.L.W. 4301 (U.S. March 2, 1971).

in which the state through judicial acquiescence has "decreed a fines only policy" for particular offenses, in which the courts have never imposed a prison sentence or have done so in only rare instances or for flagrant violations, and, finally, in which the court has decreed that the accused in a particular instance has not committed such a violation of the statute as to warrant imprisonment but only a fine? May the court in these instances "limit the punishment to payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent defendant. . . ?"[7] Under the Equal Protection Clause, presumably, the court can do so.

Thus, the vast number of indigents who in the future face imprisonment for failure to pay a fine[8] must apparently look elsewhere in the Constitution to find relief. The probable answer to their dilemma seems to lie in the guarantee of the eighth amendment that excessive fines shall not be imposed. Although the protection of the eighth amendment as yet has not been brought within the due process requirements of the Fourteenth amendment, there seems little doubt that it ultimately will be so applied.[9] To provide the imprisoned indigent protection, however, the amendment must mean that a fine is excessive when it is beyond the individual's capacity to pay. This is what the framers of the eighth amendment intended; and it is the result that should be reached in future interpretation of this constitutional guarantee.

II. *Excessive Fine Today*

The Supreme Court has not as yet decided when a fine is excessive within the meaning of the eighth amendment. In the only case dealing with this provision, the Court has merely held that "[t]he eighth amendment is addressed to courts of the United States exercising criminal jurisdiction, and is doubtless mandatory to them and a limitation on their discretion."[10]

The majority of state courts, interpreting excessive fine provisions in their respective state constitutions, hold that a fine is excessive only if it is so unusual and disproportionate to the offense as to shock public sentiment.[11] A significant minority of states do not appear to require so high a standard, merely requiring that the fine must not be dispropor-

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[7] *Id.*

[8] In 1956 the United States Bureau of the Census reported that the number of individuals imprisoned for failure to pay a fine amounted to 67.5% of all those in prison. Comment, *Fines, Imprisonment, and the Poor: "Thirty Dollars or Thirty Days,"* 57 CAL. L. REV. 778 (1969).

[9] *Id.*

[10] *Ex parte* Watkins, 32 U.S. (7 Pet.) 568 at 573-74 (1833).

[11] People v. Magoni, 73 Cal. App. 78, 238 P. 112 (1925); State v. Rodman, 58 Minn. 393, 59 N.W. 1098 (1894); State v. Wipke, 345 Mo. 283, 133 S.W.2d 354 (1939); McMahon v. State, 70 Neb. 722, 97 N.W. 1035 (1904); Commonwealth v. Smith, 409 Pa. 521, 187 A.2d 267 (1963); State v. Seraphine, 266 Wis. 118, 62 N.W.2d 403 (1954); Mississippi appears to adhere to this rule, although it uses the terminology "grossly unreasonable in relation to the offense." Wasson v. City of Greenville, 123 Miss. 642, 86 So. 450 (1920).

tionate to the offense.[12] In application there seems to be very little difference between the two standards. It has been held that the standard is a limitation on the discretion of the legislature in setting the limits of fines and not on the judiciary when applying those statutes.[13] If a fine is within the limits provided by the statute, the judicial determination of the amount of a fine can not be excessive. On the other hand, the standard is generally regarded, as directed at the judiciary, as a limitation on its discretion in imposing fines within the statutory limits, as well as at the legislature when enacting those statutes.[14]

Since neither of these two standards has been utilized to strike down a fine, they cannot at present be used to determine precisely what is an excessive fine. The Court of Appeal of the State of New York has held a fine is excessive on a factual situation almost identical to that in *Williams v. Illinois*.[15] The Court said: "The phrase 'excessive fine,' if it is to mean anything, must apply to any fine which notably exceeds in amount that which is reasonable, usual, proper or just."[16] Thus, a third standard was adopted. Although the court's decision was squarely in line with *Williams v. Illinois*, the court at one point stated that "[s]ince imprisonment for nonpayment of a fine can validly be used only as a method of collection for refusal to pay a fine we should now hold that it is illegal so to imprison a defendant who is financially unable to pay."[17] Although the Court of Appeal of New York went further than any other state court, its standard of reasonable, just, and proper is too nebulous to be of any long range value.

A close examination of the history of the provisions against excessive fine will show that the standard that the eighth amendment dictates is that a fine must be proportioned to the gravity of the offense, but cannot be an amount which is beyond the individual's capacity to pay. The states, in defining constitutional guarantees against excessive fine, have adopted only half the proper standard.

III. *History*

The adoption of the Bill of Rights in the United States Constitution was the result of the insistence of George Mason of Virginia.[18] The first ten amendments were based on the Bill of Rights adopted by the State of Virginia on June 12, 1776, some three weeks before the Declaration of Independence.[19] This famous Bill of Rights had its

[12] State v. Griffith, 83 Conn. 1, 74 A. 1068 (1910); People v. Jones, 241 Ill. 482, 89 N.E. 752 (1909); Blue v. State, 224 Ind. 394, 67 N.E.2d 377 (1946); State v. Craig, 80 Me. 85, 13 A. 129 (1888); Gooch v. Rodgers, 193 Ore. 158, 238 P.2d 274 (1951); State v. Constantino, 76 Vt. 192, 56 A. 1101 (1904); State v. Fairbanks, 25 Wash. 2d 686, 171 P.2d 845 (1946).

[13] Blue v. State, 224 Ind. 394, 67 N.E.2d 377 (1946).

[14] Weber v. Commonwealth, 303 Ky. 56, 196 S.W.2d 465 (1946).

[15] 399 U.S. 235 (1970).

[16] People v. Saffore, 18 N.Y.2d 101, 218 N.E.2d 686,688 (1966).

[17] People v. Saffore, 218 N.E.2d at 687.

[18] J. CHANDLER, GENESIS AND BIRTH OF THE FEDERAL CONSTITUTION, 151-55 (1924) [hereinafter cited as CHANDLER].

[19] *Id.*

roots in the constitutional advances made in England. "Brief as it is, it summarizes the triumphs of constitutional liberty in the Old World."[20] Section 9, providing "[t]hat excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,"[21] can be traced to section 10 of the English Bill of Rights[22] enacted by Parliament in 1689.[23]

The provision dealing with excessive fine in the English Bill of Rights was enacted to prevent certain abuses by the Crown, the greatest of which was that fines were "proportioned rather to the wishes of the Crown than to the gravity of the offense."[24] Since this was one of the abuses sought to be remedied, it seems unusual that the Bill of Rights uses the word "excessive" alone rather than stating that fines should be proportioned to the gravity of the offense, unless there was a particular standard at earlier common law which dealt specifically with this type of abuse. As Stephen noted in his *History of the Criminal Law of England,* [25] "the statutory rules as to the amount of the fines. . . which a court may impose are vague to the last degree."[26] There are only two: the provision in the Bill of Rights, which was the culmination of the constitutional advances made in England, and the other in Chapter 20 of the Magna Charta,[27] which lies at the very foundation of English Constitutional Law.

Chapter 20 of the Magna Charta states:

> [A] freeman shall not be amerced [fined or penalized] for a small offense, except according to the measure of the offense; and for a great crime except according to the heinousness of it, saving to him his contentment [that which is necessary for the support and maintenance of men]; and after the same manner a merchant, saving to him his merchandise. And a villein [feudal tenant] shall be amerced after the same manner, saving to him his wainage [farm implements], if he falls under our mercy. . . .[28]

It now appears that the fines imposed by the Crown were excessive in light of this provision of the Magna Charta in that the measure of heinousness of the offense was not taken into consideration by the judiciary in assessing the amount of the fine. Section 10 of the English Bill of Rights may be seen as merely an attempt to reimplement these standards. Indeed, the Supreme Court of Kentucky, in discussing excessive fine, noted that "[i]t is a right secured by Magna Charta . . . ."[29] What is

[20] *Id.* at 151.

[21] *Id.* at 153.

[22] *Id.* at 151-55.

[23] *Id.* at 97.

[24] 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW, 214-15, (2d ed. 1966).

[25] 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883).

[26] *Id.* at 490.

[27] *Id.*

[28] 18 H. WILLIAMS, THE HISTORIAN'S HISTORY OF THE WORLD, 352 (1907).

[29] Weber v. Commonwealth, 303 Ky. 56, 196 S.W.2d 465, 469 (1946); *see also* People v. Haug, 68 Mich. 549, 37 N.W. 21 (1888).

of greater significance are those portions of chapter 20 of the Magna Charta which indicate a limit to which the fine may be imposed in any given individual case, i.e., *that it must leave the individual with what is necessary for his support and maintenance.*

As already noted, what the state courts have adopted is only half of the standard—the gravity of the offense.[30] However, the standard imposed by the Magna Charta, the basis of the eighth amendment, is twofold: (1) The gravity of the offense must be taken into consideration; and, (2) Regardless of the offense, the fine must not be so great as to deprive an individual of what is necessary for his support and maintenance or to deprive him of his business livelihood. If the standard which the framers of the eighth amendment intended[31] is imposed, an individual cannot be fined beyond his capacity to pay. A higher amount would deprive him of his monetary support; therefore, he would be deprived of what is necessary for his support and maintenance. If the proper standard is applied, every individual has a choice of paying the fine or of going to jail; without this standard the individual who cannot afford to pay the fine has no choice at all.

It would at first seem that this would create the inverse discrimination the Supreme Court referred to in *Williams v. Illinois*.[32] However, in the vast majority of cases it would only require payment by the defendant of his fine on an installment plan at a sum payable monthly at a rate which the individual could afford. For the individual who is totally without any form of support, it would seem that the most appropriate remedy would be to allow the indigent to "work off" his fine through a job with the state and to garnish a portion of his salary.[33]

IV. *The Legal Fiction*

Imprisonment of the individual for failure to pay a fine has been traditionally viewed as a coercive device; therefore, it has not been viewed as punishment but as a means of enabling the courts to enforce the collection of the fine.[34] It is worthy of note that this is the same type of legal fiction which allowed debtors' prisons to exist. As David Ogg points out in his *England in the Reigns of James II and William III*, "[c]onfinement in a debtors' prison was not then thought of as punishment, but as providing, by the safe custody of the debtor, some kind of guarantee. . . that the debt would be paid."[35] The imprisonment of a debtor cannot force him to pay that which he does not have; yet courts today imprison an individual under the same pretext with full knowledge of his inability to pay the fine imposed. Moreover, this form

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[30] *See* cases cited notes 11 and 12 *supra*.

[31] As already noted, historians believe that the Bill of Rights in the United States Constitution was meant to incorporate the entire constitutional advancements made in England. CHANDLER, *supra* note 18.

[32] 339 U.S. 235 (1970).

[33] Note, *The Equal Protection Clause and Imprisonment of the Indigent for Nonpayment of Fines*, 64 MICH. L. REV. 938 (1966).

[34] People v. Saffore, 18 N.Y.2d 101, 218 N.E.2d 686 (1966).

[35] D. OGG, ENGLAND IN THE REIGNS OF JAMES II AND WILLIAM III, 109 (1955).

of imprisonment is punishment. As has been noted, "[p]unishment remains punishment, no matter how diligently many of our courts attempt to eradicate this truism by cleverly substituting other reasoning, other rationales, other language."[36] What is worse, courts are not providing a punishment for the offense but rather punishment for the failure to pay a fine. The indigent then is being punished for an offense which he does not have the capacity to commit, and want of capacity is a complete defense.

A fine is imposed to sentence a person convicted of an offense to pay a penalty in money.[37] It seems inconsistent that a court, having satisfied itself that a monetary payment is the appropriate punishment and that the individual is not such a menace to society as to require his incarceration, should then require the individual to be imprisoned for his failure to pay the fine without providing some alternative.[38] As has been noted, "except in theoretical and unusual circumstances, imprisonment is a greater punishment than a fine."[39]

As Justice Blackman indicated in *Tate v. Short*,[40] the effect of abolishing imprisonment for an indigent's failure to pay a fine might "encourage state and municipal legislatures to do away with the fine and to have a jail term as the only punishment. . . ."[41] Such a result is, however, unlikely, since the state and the municipality derive a great deal of revenue from the fine and would not be apt to convert this revenue into an expenditure for maintaining those convicted in jail unless the alternative methods for collection proved unworkable.

V. *Conclusion*

Imprisonment of an individual for his inability to pay a fine is not consistent with the history of excessive fine. Nor does it seem appropriate in our concept of ordered liberty that an individual should be punished for an act which he does not have the capacity to commit. Moreover, the adoption of alternative methods, such as an installment plan, for the collection of a fine are more nearly in accord with the principles surrounding fine as a punishment and could provide the state with a far greater source of revenue, while providing the indigent with a truly rehabilitative sentence.

James S. McDonald

Waters and Watercourses—Rights of the Public In Nonnavigable Waters

In the recent case of *Downes v. Crosby Chemicals, Inc.*[1] the Mississippi Supreme Court upheld the finding of the chancellor "that Hobolo-

[36] Note, *What Constitutes Punishment?*, 39 Notre Dame Law. 594, 606 (1964).
[37] State v. Belle, 92 Iowa 258, 60 N.W. 525 (1894).
[38] Williams v. Illinois, 399 U.S. 235 (1970) (concurring opinion).
[39] Morris v. Schoonfield, 301 F. Supp 158, 167 (Md. 1969) (dissenting opinion).
[40] Tate v. Short, 39 U.S.L.W. 4301, 4303 (U.S. March 2, 1971) (concurring opinion).
[41] *Id.* at 4303.

[1] 234 So. 2d 916 (Miss. 1970).

chitto Creek was not 'navigable waters,' and therefore was not a public stream . . . ."[2] The original action was brought by Crosby, owners of the bed and banks of the Hobolochitto as it traverses their land, seeking a cancellation of claims of Downes and others that the waterway was public, and an injunction against further trespass.

In its decision the Court relied upon the frequently quoted statement that "[t]he division of waters into navigable and non-navigable is merely another way of classifying them as public or private . . . ."[3] Courts through the years have precluded any use by the public of "private" streams,[4] and historically navigability has been the test as to the rights of the public.[5] In recent years, however, there has arisen a strong current of authority, completely ignored by the Mississippi Supreme Court in the *Downes* case, which questions the validity of navigability as the test of public waters.[6]

In the application of the navigability test to determine which waters are public in nature, two problems prevail. First, is navigability the best test to protect the relative rights of the private riparian owner and the public while attaining maximum utilization of the state's water resources,[7] and if so, what test of navigability should be applied?[8]

The term "navigability" is used by the courts in two senses. The federal function of defining navigability is the establishment of bed ownership and the regulation of interstate commerce.[9] It is the state definition of "navigable waters," however, which has been used to distinguish public waters from those which are private.[10]

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[2] *Id.* at 922.

[3] *Id.* at 919, *quoting* 56 AM. JUR. *Waters* § 177 (1947).

[4] Hood v. Murphy, 231 Ala. 408, 165 So. 219 (1936); Hartman v. Tresise, 36 Colo. 146, 84 P. 685 (1905); Boerner v. McCallister, 197 Va. 169, 89 S.E.2d 23 (1955).

[5] J. ANGELL, A TREATISE ON THE LAW OF WATERCOURSES § 535 (7th ed. 1877); 1 H. FARNHAM, THE LAW OF WATERS AND WATER RIGHTS § 23 (1904) [hereinafter cited as FARNHAM]. FARNHAM, at 102, states that "[t]he rights of the public are entirely dependent on the capacity of the stream for navigation."

[6] Elder v. Delcour, 364 Mo. 835, 269 S.W.2d 17, 47 A.L.R.2d 370 (1954); State *ex rel.* Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1947); Day v. Armstrong, 362 P.2d 137 (Wyo. 1961).

[7] Comment, *Real Property—Public Fishing Rights in Floatable Stream*, 1955 WASH. U.L.Q. 97, 99.

[8] *See* note 24 *infra.*

[9] Comment, *Navigable Waters—Use By Pleasure Boats As Test Whether Man-Made Stream Is Public Water*, 33 N.Y.U.L. REV. 229 (1958). The federal jurisdictional function of defining navigability is beyond the scope of this note. For a discussion of navigability in its federal sense *see* 1 R. CLARK, WATERS AND WATER RIGHTS § 37.2 (1967) [hereinafter cited as CLARK].

[10] Comment, *supra* note 9, at 230. *But see* 65 C.J.S. *Navigable Waters* § 1 (1966) which states:

> Waters may be considered to be navigable for some purposes and not for others, and a stream may be navigable or floatable in the sense that it is a highway for navigation and is subject to that easement, but not navigable in the sense that the ownership of the bed of the stream is retained by the public. *Id.* at 61.

The earliest, and still primary, use of waters by the public was for transportation.[11] It is not surprising, therefore, that navigability was first adopted as the test for public waters. As early as 1893, however, the expansion of public uses of the water was noted by the Minnesota Supreme Court in *Lamprey v. Metcalf*[12] in which the sufficiency of the navigability test was questioned:

> If the term "navigable" is not capable of a sufficiently extended meaning to preserve and protect the rights of the people to all beneficial public uses of these inland lakes, to which they are capable of being put, we are not prepared to say that it would not be justifiable, within the principles of the common law, to discard the old nomenclature, and adopt the classification of public waters and private waters.[13]

As the public uses of waters multiply, it has been suggested that the basic test in the determination of which waters are public should be the *suitability* of the particular water to public use.[14] Thus navigability, while taken into consideration, would not be the sole determinative factor in the adjudication of public rights.[15]

In *State ex rel. Game Commission v. Red River Valley Company*[16] New Mexico recognized the public's rights in nonnavigable streams without the use of either the navigability or suitability tests. The decision was based on a public ownership concept. The Constitution of New Mexico, a prior appropriation state,[17] expressly provides that the unappropriated waters of the state's natural streams belong to the public.[18] The court, quoting the constitutional provision, held in *Red River* that the public had an easement over all such waters, be they navigable or not.[19]

Objections to the right of private landowners to preclude use by the public of nonnavigable streams have long been based upon the character of water itself. It is axiomatic that water in a natural watercourse, whether navigable or nonnavigable, is not the subject of "ownership" as is a chattel or land,[20] and ownership of the soil beneath

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[11] CLARK § 37.1, at 203.

[12] 52 Minn. 181, 53 N.W. 1139, 18 L.R.A. 670 (1893).

[13] Lamprey v. Metcalf, 53 N.W. at 1143-44.

[14] CLARK § 37.4 (B), at 217.

[15] *See* Elder v. Delcour, 364 Mo. 835, 269 S.W.2d 17, 47 A.L.R.2d 370 (1954) (stream nonnavigable for the determination of bed ownership, nevertheless, held to be a public highway for floating craft, in part because of its capacity and susceptibility to public use).

[16] 51 N.M. 207, 182 P.2d 421 (1947).

[17] For a discussion of the prior appropriation doctrine *see* CLARK ch. 2.

[18] N.M. CONST. art. 16, § 2.

[19] State *ex rel.* Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1947).

[20] 3 H. TIFFANY, LAW OF REAL PROPERTY § 721 (3d ed. 1939) states:

> The water of a natural watercourse is not the subject of ownership. It has been compared in this regard to light and air, and also to wild animals, which are not private property until captured. *Id.* at 116.

a watercourse does not give ownership of the water itself.[21] Smith, in his *Survey of the Law of Real Property*,[22] states the rule:

> Under both the doctrine of riparian rights and the doctrine of prior appropriation the waters of lakes and streams belong to the public. Water is not the subject of private ownership, it can only be used.[23]

It seems paradoxical to prohibit public use of that which belongs to the public.

If navigability *is* elected as the test to distinguish public waters from those which are private, a second major problem is encountered. Which of the numerous definitions of navigability should be employed to make the distinction?[24] As previously stated,[25] the state definition of navigable waters is used in this context. The states are not in accord, however, as to how navigable waters should be defined.

The commercial utility interpretation, which arose from the early use of waters as a means of transportation, became the first widely accepted state definition of navigability.[26] To be classified as navigable under this test, a stream has to be of some commercial value.[27] Although the public's interest in waters can no longer be described solely in terms of commercial navigability,[28] the test is retained by most states today.[29]

One variation of the commerical utility test of navigability is the "saw-log" test.[30] This test, applied by the Mississippi Supreme Court in several early cases,[31] deems as navigable those streams which are commercially useful because they are periodically of sufficient depth and volume to float logs to market.[32] Although more inclusive than other commercial utility tests, the "saw-log" test, like its predecessors, bases the rights of the public upon the pecuniary value of the stream.

Over the last century an increase in the standard of living and leisure time of the American citizen has led to an explosive growth of public recreational use of the waters of this country. While this

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[21] 3 AMERICAN LAW OF PROPERTY § 12.33 (A. J. Casner ed. 1952).

[22] C. SMITH, SURVEY OF THE LAW OF REAL PROPERTY (1956).

[23] *Id.* at 218.

[24] For a discussion of the various tests of navigability *see* Note, *The Muench Case: A Better Test of Navigability*, 1957 WIS. L. REV. 486.

[25] *See* note 10 *supra*.

[26] McKinney v. Northcutt, 114 Mo. App. 146, 89 S.W. 351 (1905) (stream used to float rafts of railroad ties held navigable).

[27] FARNHAM § 23, at 100.

[28] CLARK § 37.4 (A), at 213.

[29] *See, e.g.*, McGahhey v. McCollum, 207 Ark. 180, 179 S.W.2d 661 (1944); Boerner v. McCallister, 197 Va. 169, 89 S.E.2d 23 (1955).

[30] Whisler v. Wilkinson, 22 Wis. 546 (1868).

[31] Cue v. Breland, 78 Miss. 864, 29 So. 850 (1901); Smith v. Fonda, 64 Miss. 551, 1 So. 757 (1887).

[32] Olson v. Merrill, 42 Wis. 203 (1877).

expanded recreational use bears a significant commercial value, it has undermined the commercial utility test.[33] Many courts, recognizing the problem, have tried to alleviate it by expanding the concept of navigability to suit the public need.[34] The necessity of a more liberal state rule of navigability was recognized in 1871 by Massachusetts in *Attorney-General v. Woods*.[35] Acknowledging the increased use of waters by the public for recreational purposes, the court held that even in the absence of pecuniary value, streams capable of floating small pleasure boats are navigable.[36]

In 1914 Wisconsin followed the trend towards greater recognition of public recreational rights in *Diana Shooting Club v. Husting*.[37] A stream containing water only one foot deep was declared "navigable" in that the public had the right to traverse it in shallow boats while hunting.[38] Later, however, the Wisconsin Court announced the broader and more beneficial test of navigability in fact[39] which extended the public's enjoyment of Wisconsin's water resources to those bodies of water capable of floating "any boat, skiff or canoe, of shallowest draft used for recreational purposes."[40]

Eventually, in the attempt to reach an equitable recognition of public recreational rights, the concept of navigability was stretched almost to absurdity. A stream declared by the court to be "navigable" because the public had rights upon it was not, in fact, navigable by any type of commercial traffic. Neither was it capable, in its natural condition, of floating logs, and even its capacity to support the smallest recreational craft was in doubt.[41] Notwithstanding its indiscernable form, navigability was retained by the court as the test for public waters.

Mississippi is one of five states which has enacted statutory tests of navigability based upon the commercial utility concept.[42] The state's "rather quaint definition"[43] of navigable waters is contained in two almost identical sections of the Mississippi Code Annotated of 1942:[44]

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[33] CLARK § 37.4 (A), at 213.

[34] Johnson v. Johnson, 14 Idaho 561, 95 P. 499, 24 L.R.A. (n.s.) 1240 (1908); Collins v. Gerhardt, 237 Mich. 38, 211 N.W. 115 (1926); Roberts v. Taylor, 47 N.D. 146, 181 N.W. 622 (1921); Coleman v. Schaeffer, 163 Ohio St. 202, 126 N.E.2d 444 (1955); Muench v. Public Service Comm'n, 261 Wis. 492, 53 N.W.2d 514, *aff'd on rehearing*, 55 N.W.2d 40 (1952).

[35] 108 Mass. 436 (1871).

[36] *Id.*

[37] 156 Wis. 261, 145 N.W. 816 (1914).

[38] *Id.*

[39] Muench v. Public Service Comm'n, 261 Wis. 492, 53 N.W.2d 514, *aff'd on rehearing*, 55 N.W.2d 40 (1952).

[40] Muench v. Public Service Comm'n, 53 N.W.2d at 519.

[41] Rushton *ex rel.* Hoffmaster v. Taggart, 306 Mich. 432, 11 N.W.2d 193 (1943).

[42] ALA. CODE ANN. tit. 38, § 104 (1940); GA. CODE ANN. tit. 85, § 1303 (1970); MISS. CODE ANN. § 8414 (1956); N. H. REV. STAT. ANN. § 271:9 (1955); N. Y. NAV. LAW § 2 (5) (1941).

[43] Culley v. Pearl River Indus. Comm'n, 234 Miss. 788, 108 So. 2d 390, 398 (1959).

[44] MISS. CODE ANN. §§ 686, 8414 (1956).

> All rivers, creeks and bayous in this state, twenty-five miles in length, and having sufficient depth and width of water for thirty consecutive days in the year to float a steamboat with carrying capacity of two hundred bales of cotton, are navigable waters of this state and public highways.[45]

This Mississippi statute was first enacted in 1896.[46] It embodies not only the language, but also the attitudes of the nineteenth century. The statute was drafted in an era when commercial navigability sufficiently defined the water needs and uses of the public. It stands amidst the drastically changed conditions of today, however, as a stumbling block to the application of the navigability test for equitable recognition of public rights in the waters of the state.

With the enactment of its surface water appropriation act in 1956,[47] Mississippi became the first eastern state to adopt a doctrine of prior appropriation of water resources.[48] In the first section of the act it is stated that:

> Water occurring in any watercourse, lake or other natural water body of the State, is hereby declared to be among the basic resources of this state and subject to appropriation in accordance with the provisions of this Act. . . .[49]

The Mississippi legislature chose not to express the public ownership of unappropriated waters as did the New Mexico constitutional provision[50] utilized in *State ex rel. Game Commission v. Red River Valley Company*.[51] In the absence of a clear expression of legislative intent to the contrary, however, the effect of the provisions would appear to be identical.[52] Until appropriated in accordance with the appropriation act, the waters of Mississippi's natural watercourses are "basic resources of the state,"[53] and, in the usufructuary manner in which waters are capable, belong to be public.

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[45] *Id.* § 686.

[46] Ch. 64 [1896] GEN. LAWS MISS. 76.

[47] MISS. CODE ANN. §§ 5956-01 to -30 (Supp. 1968).

[48] For fuller discussion of the Mississippi prior appropriation act, *see* Champion, *Prior Appropriation in Mississippi—A Statutory Analysis*, 39 MISS. L.J. 1 (1967); Comment. *Mississippi Water Conservation Law*, 28 MISS. L.J. 190 (1957).

[49] MISS. CODE ANN. § 5956-01 (b) (Supp. 1968).

[50] N.M. CONST. art. 16, § 2 states:

> The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state.

[51] 51 N.M. 207, 182 P.2d 421 (1947).

[52] As it originally appeared in ch. 167, § 1 (b) [1956], GEN. LAWS MISS. 172, the declaration of policy of the water appropriation act read: "Water occurring in any watercourse, lake or other natural water body of the state, is hereby declared to be public waters and public wealth of the state. . . ." This section was amended by ch. 218, § 1 (b) [1962], GEN. LAWS MISS. 237 to read as it does today. The implication that the legislature desired an interpretation of this section different from that of the New Mexico provision, however, is supported by no evidence found elsewhere.

[53] MISS. CODE ANN. § 5956-01 (b) (Supp. 1968).

In *Downes v. Crosby Chemicals, Inc.*[54] the Mississippi Supreme Court chose not to recognize the principle of public ownership of water under the prior appropriation doctrine. Likewise, the Court failed to take notice of the expanding public need for water resources and the trend towards greater recognition of public rights in both navigable and non-navigable waters. Instead, the Court employed an antiquated commercial utility test of navigability to stint the public use of nonnavigable watercourses throughout the state. By so doing, the Court declared that, in Mississippi, navigability continues to be the test of public waters, and rights of the public in nonnavigable waters remain nonexistent.

Richard T. Phillips

PRESBYTERIAN CHURCH V. HULL MEMORIAL PRESBYTERIAN CHURCH—SUPREME COURT PRONOUNCEMENTS AGAINST A CIVIL COURT'S DETERMINATION OF CHURCH DOCTRINE IN PROPERTY DISPUTES

I. *Introduction*

The recent United States Supreme Court decision of *Presbyterian Church v. Hull Memorial Presbyterian Church*[1] sheds new light on a civil court's right to render decisions affecting the ownership of church property. In this decision the Supreme Court explicitly stated that a civil court could not base a decision as to the ownership of property which was the subject of an intrachurch property dispute on an interpretation of church doctrine.[2] This was held to be a violation of the first amendment as applied to the states through the fourteenth amendment.[3] This decision seemed predictable in view of past Supreme Court decisions reflecting the policy of maintaining separation of church and state.

The purpose of this note will be to examine the *Hull* decision, the decisions that *Hull* is based upon, possible alternative bases for deciding cases involving church property disputes, and the effect of *Hull* upon Mississippi cases and statutes.

Before examining the *Hull* decision it is necessary to point out that there are two main types of church polity, congregational and hierarchical. A hierarchical church polity is basically one in which "a local church is a member of a larger and more important religious organization, and is under its government and control."[4] "The voluntary act of joining the general denominational organization subjects the local church to its rules and regulations."[5] The local church must obey the general church's rules regulating the government and conduct of its ad-

[54] 234 So. 2d 916 (Miss. 1970).

[1] 393 U.S. 440 (1969).

[2] *Id.* at 449.

[3] *Id.*

[4] 45 AM. JUR. *Religious Societies* § 4 at 725 (1943). Examples of hierarchical churches are the Catholic, Presbyterian, and Methodist churches.

[5] *Id.* at 725.

herents, congregations, and officers.[6] The members and officers of the local church must obey the final decisions and orders of the supreme judicial tribunal of the general church.[7] A congregational polity is one in which there is no ecclesiastical organization above the congregation that has real power over the congregation.[8] Courts usually consider the decision of a majority of the congregation as the final decree as to ecclesiastical matters.[9] It is necessary to distinguish between hierarchical and congregational church polities, because courts often apply different rules to each in deciding church property disputes.

The *Hull* decision involves a hierarchical church; however, the rule and policy of *Hull* is meant to apply to both types of church polity.

II. *The* Hull *Decision*

In *Hull* a controversy arose between the general church (Presbyterian Church in the United States) and two local churches (Hull Presbyterian Church and Eastern Heights Presbyterian Church) located in Savanna, Georgia, over the right to properties which had been used by the local churches until the controversy developed.[10] The members of the local churches voted to break away from the general church and reorganize as an independent and autonomous religious organization.[11] They felt that the general church had ceased to abide by the doctrines and practices which were in effect at the time of their affiliation with the general church.[12] The local membership was supported by their

[6] 45 AM. JUR. *Religious Societies* § 41 (1943); Linton v. Flowers, 230 Miss. 838, 94 So. 2d 615 (1957); Grantham v. Humphries, 185 Miss. 496, 59 So. 810 (1939); Windham v. Ulmer, 102 Miss. 491, 59 So. 810 (1912); Carothers v. Moseley, 99 Miss. 671, 55 So. 881 (1911).

[7] *See* cases cited note 6 *supra.*

[8] 45 AM. JUR. *Religious Societies* § 4 (1943); Blue v. Jones, 230 So. 2d 569 (Miss. 1970); Roundtree v. Fletcher, 109 Miss. 830, 69 So. 689 (1915); Windham v. Ulmer, 102 Miss. 491, 59 So. 810 (1912). An excellent example of a congregational church is the Baptist Church.

[9] *See* cases cited note 8 *supra.*

[10] 393 U.S. at 442.

[11] *Id.*

[12] The local churches considered the following actions to be departures from the practices and doctrines of the general church which were in effect at the time of their affiliation with the general church:

> [O]rdaining of women as ministers and ruling elders, making pronouncements and recommendations concerning civil, economic, social and political matters, giving support to the removal of Bible reading and prayers by children in the public schools, adopting certain Sunday School literature and teaching neo-orthodoxy alien to the Confession of Faith and Catechisms, as originally adopted by the general church, and causing all members to remain in the National Council of Churches of Christ and willingly accepting its leadership which advocated named practices, such as the subverting of parental authority, civil disobedience and intermeddling in civil affairs . . . the general church has . . . made pronouncements in matters involving international issues such as the Vietnam conflict and has disseminated public actions denying the Holy Trinity and violating the moral and ethical standards of the faith. 224 Ga. 61, 62-63, 159 S.E.2d 690, 692 (1968).

ministers and most of the elders.[13] The general church set up a commission which sought conciliation. When this failed, they sought to take control of the property of the local churches.[14]

The local churches did not appeal the commission's action to higher church authority. They filed suit in a Georgia civil court and asked that the general church be enjoined from trespassing on the property in controversy.[15] The local churches claimed that they had title to the property.[16] The general church asked that the case be dismissed and that it be granted injunctive relief.[17] The general church contended that civil courts did not have the power to determine whether a general church had departed from its tenets of faith and practice.[18] The court refused to dismiss the case. The Georgia court recognized the general rule that in the case of a hierarchical church there is an implied trust upon the local church properties for the benefit of the general church;[19] however, the court said that this trust was a conditional one. The Georgia court said that the trust was valid as long as the general church adhered to the religious doctrine and practices that existed at the time the local churches affiliated with the general church.[20] The jury was instructed and found that the actions of the general church amounted to a " 'fundamental or substantial abandonment of the original tenets and doctrines of the [general church], so that the new tenets and doctrines . . . [were] utterly variant from the purpose for which the [general church] was founded.' "[21] The Georgia Supreme Court affirmed the decision, and the property was awarded to the local churches.[22]

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[13] 393 U.S. at 442-43.

[14] *Id.* at 443.

[15] *Id.*

[16] The property of the local churches was obtained after association with the (general) Presbyterian Church. Both churches were incorporated, non-profit institutions. The Eastern Heights church had three tracts of property. One deed simply named Eastern Heights Presbyterian Church, a religious corporation, as grantee. The two other deeds named as grantees certain persons as "Trustees of the Eastern Heights Presbyterian church and their successors in office." One deed stated that the property was to be held in trust "for the use and benefit of the congregation of the Eastern Heights Presbyterian Church." The general church never made any gifts or loans to Eastern Heights. A 1914 deed to the Hull church named the Mary Elizabeth Blue Hull Memorial Church as grantee and stated that the property was to be used for a place of worship by a Presbyterian Church known as the named grantee. Later deeds named also named the Hull Memorial Church as grantee. The general church never contributed any money to the Hull memorial church. Presbyterian Church v. Eastern Heights Presbyterian Church, 224 Ga. 61, 159 S.E.2d 690 (1968).

[17] 393 U.S. at 443.

[18] *Id.*

[19] *Id. See, e.g.*, Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871); St. John's Presbytery v. Central Presbyterian Church, 102 So. 2d 714 (Fla. 1958); Presbytery of the Everglades v. Morgan, 125 So. 2d 762 (Fla. Dist. Ct. App. 1961). The recognition of this role may be found by implication in Linton v. Flowers, 230 Miss. 838, 94 So. 2d 615 (1957). *See also* Comment, 54 VA. L. REV. 1451 (1968).

[20] 393 U.S. at 443.

[21] *Id.* at 443-44.

[22] 224 Ga. 61, 159 S.E.2d 690 (1968).

The United States Supreme Court reversed and remanded the Georgia Court's decision.[23] The Court stated the issue in the case to be the following:

> The question presented is whether the restraints of the First Amendment, as applied to the States through the Fourteenth Amendment, permit a civil court to award church property on the basis of the interpretation and significance the civil court assigns to aspects of church doctrine.[24]

In answering the issue in the negative the Supreme Court stated that the "departure-from-doctrine" aspect of the Georgia implied trust concept which the Georgia courts applied to this case was a violation of the first amendment, for it requires a court to interpret church doctrine and matters of an ecclesiastical nature.[25] The Court said that the first amendment limits a civil court's power in resolving church property disputes.[26] The Court stated "the [first] Amendment . . . commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine."[27] The Court pointed out that there is nothing wrong with civil courts assuming jurisdiction over disputes involving church property, and there are neutral principles of property which a civil court could use in deciding such disputes.[28]

The Court also pointed out that even if the general church had applied the state "departure-from-doctrine" concept a civil court could not review and enforce the decision without violating the first amendment, because the state would be using the church to interpret and apply state standards.[29]

III. *Background for* Hull

In rendering their decision in *Hull* the Supreme Court relied primarily on the cases of *Watson v. Jones*,[30] *Kedroff v. St. Nicholas Cathedral*,[31] *Gonzalez v. Archbishop of Manila*,[32] and *Kreshik v. St. Nicholas Cathedral*.[33]

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[23] Presbyterian Church v. Hull Memorial Presbyterian Church, 393 U.S. 440 (1969). On remand, the Georgia Court held that since the departure from doctrine portion of Georgia's implied trust theory had been destroyed that thus the whole theory was invalidated. The Court then held that the local churches had title to the disputed properties. The Court said that since the implied trust theory had been destroyed and that since a trust for the general church could not be found in the deeds, or implied under a statute, or required by the general church's constitution that thus the property could be given to the local churches. 225 Ga. 259, 167 S.E.2d 658 (1969).

[24] 393 U.S. at 441.

[25] *Id.* at 449-50.

[26] *Id.* at 449.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] 80 U.S. (13 Wall.) 679 (1871).

[31] 344 U.S. 94 (1952).

[32] 280 U.S. 1 (1929).

[33] 363 U.S. 190 (1960).

Watson v. Jones[34] is generally considered the leading decision dealing with church property disputes. Although much has been written about the case, no note on church property disputes would be complete without a brief look at the general guidelines for settling church property controversies which were laid down in *Watson.*

In *Watson v. Jones* a disagreement occurred within the membership of the Walnut Street Presbyterian Church. The controversy led to the forming of two separate groups—each claiming the right to the church property. One group withdrew from the Presbyterian Church of the United States, and the other remained loyal to the general church and its doctrine. The controversy centered over the general church's attitude toward slavery and the necessity for people who aided the South in the Civil War to forsake the old Southern church doctrines condoning slavery before they could become members, pastors, or missionaries.[35] The state court found for the group disagreeing with the general church. In so finding, they overturned the decision of the general church's general assembly.[36]

The Supreme Court in upholding the group favored by the general church stated that the courts of this country should not decide doctrinal matters, and that civil courts could not overturn such decisions.[37]

In the *Watson v. Jones* case the Supreme Court stated certain rules which were to be used in deciding church property controversies. The court divided the types of cases which involved church property controversies into the following headings:

> 1. The first of these is where the property which is the subject of controversy has been, by the deed or will of the donor, or other instrument by which the property is held, by the ex-

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[34] 80 U.S. (13 Wall.) 679 (1871).

[35] *Id.* at 691.

[36] Watson v. Avery, 65 Ky. (2 Bush) 332 (1867).

[37] Watson v. Jones, 80 U.S. (13 Wall.) 679, 728-29 (1871). A clear exception to the rule that civil courts cannot overturn ecclesiastical decisions was enunciated in Gonzalez v. Archbishop of Manila, 280 U.S. 1 (1929), which is discussed later in this note.

An excellent discussion of Watson v. Jones and the law as it relates to church property disputes may be found in Comment, *Judicial Intervention in Church Property Disputes—Some Constitutional Considerations,* 74 YALE L.J. 1113 (1965). Other articles pertinent to the subject of this note are: Kauper, *Church Autonomy and the First Amendment: The Presbyterian Church Case,* 1969 SUP. CT. REV. 347; Note, *Judicial Intervention in Disputes Over the Use of Church Property,* 75 HARV. L. REV. 1142 (1962); Comment, *Constitutional Law—Church Property Disputes—First Amendment Prohibits Judicial Examination of Ecclesiastical Matters,* 54 IOWA L. REV. 899 (1968-69); Comment, *Hull Memorial: A Limited Solution to the Problem of Judicial Intervention in Church Property Disputes,* 18 KAN. L. REV. 71 (1969); Note, *Religious Societies—Church Property Disputes—The Implied Trust Doctrine,* 47 N.C. L. REV. 219 (1968); Comment, *Limitation on Civil Courts in Church Property Disputes,* 21 S.C. L. REV. 441 (1968-69); Comment, *Limitation on the Power of Courts in Resolving Church Property Disputes,* 36 TENN. L. REV. 549 (1968-69).

press terms of the instrument devoted to the teaching, support, or spread of some specific form of religious doctrine or belief.

2. The second is when the property is held by a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority.[38]

3. The third is where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization.[39]

The Supreme Court said, in the first type of case, that a court will enforce the trust as long as there are people willing to adhere to and teach the doctrines specified in the trust.[40] The Court said that if the trust is given to a congregational church, the majority could not direct the property to a use inconsistent with the doctrinal views stated in the trust, and that an associated (hierarchical) form of church government would lose the property if it ceased to adhere to the doctrinal pronouncements of the trust.[41] The Court said that a court could inquire as to whether or not a different doctrine was being taught or practiced by a church.[42] The *Hull* case would seem to destroy a court's right to make such an inquiry. Future settlors may have difficulty drawing trusts which require a church to adhere to specific doctrines.[43]

In the second type of case (congregational polity) if there is no specific trust attached to the church property, then it is governed by the rules that govern a voluntary association.[44] This means that if the type of government used by the church is majority rule of the congregation, then the majority rules and the court must abide by their decisions. The court may make no inquiry into the religious views of those in control to ascertain if they have deviated from church doctrine.[45]

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[38] 80 U.S. (13 Wall.) at 722. The Court is talking about situations in which the property is held by a congregational Church polity.

[39] *Id.* at 722-23. The Court is referring to cases in which the property is held by a church with a hierarchical polity.

[40] *Id.* at 723. This statement is actually dictum, but it has been followed. Mt. Helm Baptist Church v. Jones, 79 Miss. 488, 30 So. 714 (1901) seems to recognize this rule.

[41] 80 U.S. (13 Wall.) at 723.

[42] *Id.* at 724.

[43] A discussion of this specific problem and ways to insure that a settlor's wishes are carried out without coming into conflict with the Hull decision may be found in Comment, *Enforcing Conditons Placed on Gifts to Religious Institutions—Judicial Interference with the Full Exercise of Religion*, 49 BOST. U.L. REV. 742 (1969).

[44] Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872).

[45] *Id.* at 725. The Court's statement with regard to the majority congregational

In the third type of case (hierarchical polity) the Court said that "[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them. . . ."[46]

In the *Hull* decision the court cited *Gonzalez v. Archbishop of Manila.*[47] The Court reaffirmed the exception which this case made to the general rule, expressed in the *Watson* case, that civil courts cannot review church decisions. The case stands for the proposition that a civil court must abide by the decision of a church tribunal "in the absence of fraud, collusion, or arbitrariness."[48] This type of "due process jurisdiction" was recognized in Mississippi even before this decision in the cases of *Roundtree v. Fletcher*[49] and *Mason v. Lee.*[50]

The Supreme Court also relied on the case of *Kedroff v. St. Nicholas Cathedral.*[51] In *Kedroff* the United States Supreme Court struck down a New York statute[52] recognizing the autonomous nature of the North American Russian Orthodox Church after they broke away from the general Russian Orthodox Church which had its home in the Soviet Union. The Court declared that "legislation that regulates church administration, the operation of the churches, the appointment of clergy,"[53] or which seeks to transfer control of the church from one body to another is unconstitutional.[54] In *Hull* the Court pointed out that *Kedroff* relied on *Watson* for the proposition that churches should be as free as possible from state interference in matters of church government and doctrine.[55]

The Supreme Court also relied on *Kreshik v. St. Nicholas Cathedral.*[56] In *Kreshik* the New York courts had attempted to do by judicial action what had failed as legislative action. The United States Supreme Court struck down a New York Court of Appeal decision[57] which attempted to give the regulation of, and power over, the St. Nicholas Cathedral in New York City to the Archbishop for the

rule was dicta; however, some courts have recognized it. *See* Mississippi cases cited note 8 *supra.*

[46] *Id.* at 727. *See also* Carothers v. Mosely, 99 Miss. 830, 55 So. 810 (1911).

[47] 280 U.S. 1. In this case Gonzalez claimed that he should be made a chaplain in the Catholic Church. He claimed his right under a will which stated that one of his family members was to be made a chaplain. He was refused the chaplaincy because he failed to meet the standards set by the church law. The decision of the church was affirmed.

[48] *Id.* at 16.

[49] 109 Miss. 830, 69 So. 689 (1915).

[50] 96 Miss. 186, 50 So. 625 (1909).

[51] 344 U.S. 94 (1952).

[52] N. Y. RELIGIOUS CORPORATION LAW ch. 50, §§ 105, 107 (McKinney 1945).

[53] 344 U.S. at 107.

[54] *Id.* at 107-08, 119.

[55] 393 U.S. 440, 448 (1969).

[56] 363 U.S. 190 (1960).

[57] St. Nicholas Cathedral v. Kreshik, 7 N.Y.2d 191, 164 N.E.2d 687, 196 N.Y.S.2d 709 (1959).

Autonomous Russian Orthodox Church of America rather than to the Moscow appointed Patriarch.

IV. *Alternative Bases for Deciding Church Property Disputes*

The *Hull* decision is vague about the guidelines which state courts should follow in deciding church property disputes. The answer may possibly be found in the concurring opinion in *Maryland and Virginia Eldership v. Church of God.*[58] Justice Brennan in a concurring opinion with Justices Douglas and Marshal laid out certain general guidelines which may aid state courts in deciding church property disputes. In this case the regional church (The Maryland Virginia Eldership of the Churches of God) sought to prevent a majority of the congregation of two local churches from breaking away from the regional church and taking their property with them. The first time the case reached the Supreme Court they ordered that it be decided in accord with the *Hull* case.[59] The second time, in a per curiam opinion, they dismissed an appeal by the regional church of a state decision giving the property to the local churches.[60] The Maryland Court of Appeal had based its decision on a state statute[61] governing the incorporation of religious corporations, language in the church property deeds, charters of the two local churches, and the constitution of the General Eldership of the Maryland and Virginia Eldership.[62] The Supreme Court found that the Maryland Court of Appeal decision was not based upon an interpretation of religious doctrine and dismissed the appeal.[63]

In the concurring opinion Justice Brennan said: "A State may adopt any one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith."[64]

In the opinion three approaches were outlined. The Court said that the states may follow *Watson v. Jones*:

> [A]nd enforce the property decisions made within a church of congregational polity "by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government," (*Watson v. Jones* 80 U.S. (13 Wall.) 679, 724 (1871), and within a church of hierarchical polity by the highest authority which has ruled on the dispute at issue (footnote omitted), unless "express terms" in the "instrument by which the property is held" condition the property's use or control in a specified manner.[65]

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[58] 396 U.S. 367 (1970).

[59] 393 U.S. 528 (1969).

[60] 396 U.S. 367 (1970).

[61] 2 MD. CODE ANN. art. 23, § 256-370 (1957).

[62] Maryland and Virginia Eldership v. Church of God, 254 Md. 162, 254 A.2d 162 (1969).

[63] 396 U.S. 367 (1970).

[64] *Id.* at 368.

[65] *Id.* at 368-69.

The opinion also pointed out that if a court took the *Watson* approach a court cannot determine if a church's ruling body has the authority under religious law to control the property in issue because this "frequently necessitates the interpretation of ambiguous religious law and usage."[66] The opinion further stated that if there is a question as to the identity of the ruling body in a church the court cannot base its decision on an inquiry into church law and usage.[67] A court cannot base its decision on a determination of doctrinal questions or an "extensive inquiry into religious polity."[68]

The opinion next restated the rule in *Hull* that a court could base its decisions on neutral principles of property law used in all property controversies.[69] In explaining this concept Justice Brennan said that courts should utilize the "formal title" approach.[70] This means that courts may determine ownership by a study of deeds, reverter clauses, and general state corporation laws.[71] The opinion emphasized that these property laws cannot be used if "the application requires civil courts to resolve doctrinal issues."[72] The Court said: "For example, provisions in deeds or in a denomination's constitution for the reversion of local church property to the general church, if conditioned upon a finding of departure from doctrine could not be civilly enforced."[73] It was pointed out that a state would have to take the *Watson* approach in this type of case, and that states that take the *Watson* approach would probably have to apply general property law when a determination of the "relevant church governing body is impossible without immersion in doctrinal issues or extensive inquiry into church polity."[74]

The opinion stated that a state might pass statutes "governing church property arrangements in a manner that precludes state interference in doctrine."[75] Justice Brennan pointed out the statutes should be "carefully drawn to leave control of ecclesiastical polity, as well as doctrine, to church governing bodies."[76] The opinion cited *Northside Bible Church v. Goodson*[77] (which was decided prior to *Hull*) as an example of a statute so broadly drawn as to violate *Hull*. In *Goodson* a United States District Court declared an Alabama statute unconstitutional which stated that 65 percent of the adult membership of a church could break away from the general church if there had been a "change of the social policies of the parent church or any one or more of its affiliated organizations."[78] The Alabama statute provided that the

[66] *Id.* at 369.
[67] *Id.* at 370.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.* at 370 n. 4.
[75] *Id.* at 370.
[76] *Id.*
[77] 261 F. Supp. 99 (S.D. Ala. 1966), *aff'd* 387 F.2d 534 (5th Cir. 1967).
[78] ALA. CODE tit. 58, § 104-113 (Supp. 1969).

majority could sever its ties with the parent church and take the church property regardless of any trust which placed ownership of the property in the General Church's hands.[79] The District Court based its decision on the fact that "by vesting in a 65 percent majority of the local congregation the power to abrogate the Methodist trust clause, the Dumas Act effectively impairs or destroys the itinerant ministry feature of the Methodist church."[80] It seems that if the trust clause were destroyed that the Methodist church's right to appoint ministers to local churches would be lost and the court felt this was a constitutional right which the state could not take from the church.[81] The Court also felt that the statute was unconstitutional because it allowed a state legislature to change the system of property ownership provided by the ecclesiastical systems of several protestant denominations.[82]

Justice Brennan's statement that a state might pass special statutes governing church property arrangements in a manner that precludes state interference in doctrine, and the invalidation of the Alabama statute draws into question the constitutionality of sections 1273-01 and 1273-02 of the Mississippi Code.[83] This statute provides that if 66⅔ percent of the local beneficiaries of a trust for religious purposes determine that a "deep-seated and irreconcilable hostility or tension"[84] exists between them and the trustees or others in control of the trust property, they may file suit in chancery court. If the chancery court finds that the allegations of the local beneficiaries are true, the beneficiaries can discharge the existing trustees and all others in control over the administration of the trust and appoint other trustees with complete control over the property.[85] The statute defined local beneficiaries as those people living in Mississippi who contributed or whose predecessors contributed all or a large part of the corpus of the trust and who locally and directly enjoy the benefits of the trust.[86]

Although the Mississippi statute does not clearly state that a local church can break away from the general church, as did the Alabama statute, it may be argued that the practical effect of the statute is the same as that of the Alabama statute. It would appear that the rationale similar to that used in *Goodson* might be used to invalidate the statute. Also, the fact that the court must pass on the question of the depth of the controversy between the trustees and the local beneficiaries may result in doctrinal decision or determination by the court. This of course is expressly forbidden in the *Hull* decision.

V. *Effects of* Hull *upon Mississippi*

As stated earlier the *Hull* decision makes the constitutionality of

[79] *Id.*

[80] 261 F. Supp. at 102.

[81] The Court relied on Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952) and Kreschick v. St. Nicholas Cathedral, 363 U.S. 190 (1960).

[82] 261 F. Supp. at 103-04.

[83] Miss. Code Ann. 1273-01 to -02 (Supp. 1968).

[84] *Id.*

[85] *Id.*

[86] *Id.* § 1273-01 (b).

the Mississippi Code Annotated, Sections 1273-01 and 1273-02 (Supp. 1966) doubtful.

Mississippi courts have assumed jurisdiction over church property disputes;[87] however, they have generally refused jurisdiction over ecclesiastical disputes in which doctrine or church polity is the primary question.[88] The Mississippi courts actually seem to have been following the rule and policy in the *Hull* decision before the decision was rendered. In *Carothers v. Mosely*[89] the Supreme Court of Mississippi upheld the right of a chancellor to refuse jurisdiction over a case involving church property rights because a decision would involve a decision on a purely ecclesiastical question. In this case the court relied on *Watson v. Jones* and refused to adjudicate property rights which involved a decision on a purely ecclesiastical question. The court deferred to a church tribunal.

In the case of *Smith v. Charles*[90] the Mississippi Supreme Court upheld a chancellor's right to refuse jurisdiction of a case in which the congregation of a church wanted to enjoin their pastor from preaching, because they felt he was preaching a doctrine contrary to the doctrine orginally adhered to by the church. In refusing to hear the case, the chancellor said equity had no jurisdiction to base decisions upon an abandonment of faith, custom, or usage.

There are two Mississippi cases which *Hull* would seem to have invalidated as precedent. *Mt. Helm Baptist Church v. Jones*[91] involved an intrachurch property dispute in a congregational church. The court held that the minority faction was entitled to the use of the property, since it was the group which adhered to the doctrine of the church as originally constituted. The doctrinal determination was based upon theological determinations by the court as to what the doctrines originally were and what they were at the time of the break. In *Linton v. Flowers*[92] sixty-six members of the Methodist Church voted to withdraw from the Mississippi Annual Conference and the General Conference of Methodist Protestant Churches. The dissident group, led by their minister Linton, advocated immersion baptism which was contra to the Methodist Rules of Discipline. The court gave the property to a minority group of thirty-five members. The court said their trustees were entitled to the control and use of the property, because they adhered to the faith of the church as constituted at the time the Antioch Church became

[87] Conic v. Cobbins, 208 Miss. 203, 44 So. 2d 52 (1950); Mt. Helm Baptist Church v. Jones, 79 Miss. 488, 30 So. 714 (1901).

[88] Blue v. Jones, 230 So. 2d 569 (Miss. 1970); Conic v. Cobbins, 208 Miss. 203, 44 So. 2d 52 (1950); Edwards v. DeVance, 138 Miss. 580, 103 So. 194 (1925); Windham v. Ulmer, 102 Miss. 491, 59 So. 810 (1912); Smith v. Charles, 76 Miss. 458, 24 So. 968 (1899); Dees v. Moss Point Baptist Church, 17 So. 1 (Miss. 1895). *See also* Note, *Jurisdiction Exercised by the Civil Courts Over Ecclesiastical Matters*, 12 MISS. L.J. 475 (1940).

[89] 99 Miss. 671, 55 So. 881 (1911).

[90] 76 Miss. 458, 24 So. 968 (1899).

[91] 79 Miss. 488, 30 So. 714 (1901).

[92] 230 Miss. 838, 94 So. 2d 615 (1957).

affiliated with the general church. The court based its decision upon the strict wording of the Rules of Discipline (the law of the church). There was little room for determination of church doctrine; however, *Hull* would seem to prohibit this type of action.

In conclusion it must be pointed out that the Supreme Court of the United States has expressly barred a court from basing a church property decision on a determination of church doctrine, and, with the exception of a concurring opinion discussed earlier, the guidelines that a civil court may follow in deciding such disputes seem somewhat uncertain. It appears clear, however, that the Supreme Court is determined to keep state interference with religion to a minimum.

Benjamin A. Hardy

Res Gestae: A Need for Guidelines

I. *Introduction*

A recent decision by the Mississippi Supreme Court which attempts to define the *res gestae* exception to the hearsay rule, sounds much like Mr. Justice Stewart's remark on obscenity, "[B]ut I know it when I see it. . . ."[1] In *McCaskill v. State*,[2] the court disregarded past decisions which give substance to the *res gestae* exception and found that the term *res gestae* is incapable of definition. In *McCaskill* the court held that whether a hearsay statement is part of the *res gestae*, and thus admissible, is within the discretion of the trial judge.[3]

Meaning literally "things done," the term *res gestae* includes all things connected with the occurrence or act in dispute. *Res gestae* has presented a monumental problem to the judiciary through the years. The problem has not been one of definition, but of application. In decisions prior to *McCaskill*, the court established guidelines for the introduction of hearsay testimony as a part of the *res gestae*.

As far back as 1857, the Mississippi Supreme Court began establishing guidelines for determining whether certain statements should be admitted as a part of the *res gestae*. The case of *Holman v. Murdock*[4] created the rule that if evidence is to be admitted as part of the *res gestae*, the declaration must be a part of the occurrence and explain or illustrate it. This rule was followed and restated the very next year in the case of *Fulton v. Fulton*.[5] Also in 1858, the landmark case of *Meek v. Perry*[6] established the rules that statements to be admitted as

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[1] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).

[2] 227 So. 2d 847 (Miss. 1969). Although McCaskill v. State was reversed on other grounds, the failure of the court to include the admission of the hearsay testimony as one of the reversible errors, indicates the court's position on *res gestae*.

[3] *Id.* at 852.

[4] 34 Miss. 275 (1857).

[5] 36 Miss. 517 (1858).

[6] 36 Miss. 190 (1858).

part of the *res gestae* must be made spontaneously, without artifice or premeditation and contemporaneously with the transaction.[7] *McCaskill* has apparently swept away these guidelines.

II. *The* McCaskill *Case*

The defendant in the *McCaskill* case was a medical doctor accused of violating section 2223, Mississippi Code 1942 Annotated (Supp. 1966), which makes the death of the mother resulting from an illegal abortion the crime of murder. The jury returned a verdict of guilty and the defendant appealed. During the course of the trial, the defendant objected to the admission of hearsay testimony by the mother of the deceased regarding an alleged telephone conversation. The mother was allowed to testify that on the day before she learned of her daughter's death she placed a telephone call to her daughter at defendant's clinic. In this conversation, the mother asked her daughter whether she was all right, to which she replied, "[Y]es, I am all right." Her mother then asked her if she were sure and the daughter answered, "[Y]es, I am sure. You know that—of my pregnancy—and I am up here to the doctor getting something done about it."[8]

Counsel for defendant objected to this evidence. The state contended that the statements of the deceased were a part of the *res gestae* and admissible as an exception to the hearsay rule.

In affirming the trial court's decision that the statements were admissible, the Court quoted at length from *Starks v. State*[9] as follows:

> "The rule as to the admissibility of evidence known as the 'res gestae rule' has been declared to be incapable of any precise definition, and it has been applied to so many different and unrelated situations that it has been said that the difficulty of formulating a description of 'res gestae' which will serve for all cases seems insurmountable." 32 C. J. S. Evidence § 403, p. 19. Again, in this same text, it is stated: "No hard and fast rule can be laid down as to the admissibility of evidence as a part of the res gestae. The facts and circumstances presented in different cases vary so widely that the courts have come to the point of adjudging this question as it is presented by the particular case under consideration; and the admissibility vel non of evidence as part of the res gestae is a matter resting very largely at the discretion of the trial court."[10]

The court apparently is saying that the doctrine of *res gestae* is nebulous; therefore, there can be no guidelines for the introduction of hearsay evidence under this exception to the hearsay rule.

The problems raised by the *McCaskill* decision are readily apparent. The court's broad, vague, and indefinite explanation of the *res gestae*

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[7] *Id.* at 260.

[8] *Id.* at 849.

[9] 245 Miss. 238, 147 So. 2d 503 (1962).

[10] *Id.* at 242-43, 147 So. 2d at 505.

exception to the hearsay rule will minimize the predictability of rulings on hearsay evidence, and increase both the difficulties of preparing for trial and the possibilities of reversal. Because *res gestae* is not capable of precise definition does not mean that it is not capable of some definition. A major function of the court is to establish guidelines for practitioners and for judges of the lower courts in future cases. The *McCaskill* decision fails to produce these necessary guidelines.

III. *The* Starks *Case*

To fully understand the court's ruling in *McCaskill*, it is necessary to take a closer look at *Starks v. State*,[11] the case given as authority for the holding. The evidentiary problem the court was asked to solve in *Starks* was whether certain statements made by the person beaten and robbed should have been admitted. The appellant contended that the statement made by the victim that he "did not know who did it, whether they were white or colored, or how many there were,"[12] was a part of the *res gestae*. The appellant sought to introduce the evidence as a prior inconsistent statement of the victim, who had not accused appellant of the crime until one week after the incident, although it had been shown that the appellant was known to the victim and had been for years.[13] Since the statement was not offered to prove the truth of the matter stated, it is apparent that *Starks* did not even pose a hearsay problem.

The Mississippi Supreme Court held that since a rule for the admissibility of evidence as a part of the *res gestae* was incapable of any precise definition, the admissibility *vel non* was a matter resting largely in the discretion of the trial court. To refuse admission of this evidence was not error.[14]

The victim made the statement that he did not know who had robbed him quite some time after the occurrence of the incident. If the Mississippi Court had turned to several prior Mississippi cases, where guidelines had been established for the *res gestae* exception, the problem *McCaskill* created might not exist.

IV. *Importance of the Time Element*

The time element between the act and the statement in question has been mentioned in many cases. Although no specific time limit between the act and the statement proposed as evidence has been established, in those cases where statements have been admitted as part of the *res gestae* they have usually been very close in time to the disputed act. In *Magee v. State*,[15] the outcry, "Come here somebody, my wife has done killed me,"[16] was held to be admissible as a part of the *res gestae*, the outcry being almost simultaneous with the fatal act.

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[11] *Id.* at 238, 147 So. 2d at 503.

[12] *Id.* at 241, 147 So. 2d at 504.

[13] *Id.*

[14] *Id.* at 243, 147 So. 2d at 505.

[15] 145 Miss. 227, 110 So. 500 (1926).

[16] *Id.* at 230, 110 So. at 501.

In *Masonite Corp. v. International Woodworkers of America*[17] unidentified striking workers' statements were ruled admissible as part of the *res gestae*. The workers' comments indicated the temper of the crowd at the time the dispute in question occurred. During the trial of an automobile accident case, the exclamation of the driver of one of the cars involved, just prior to the collision, "Man, what in the world are you going to do!," was held admissible as part of the *res gestae*.[18]

From the facts presented in *McCaskill*, it is impossible to determine the proximity of the deceased's statements to the act; but it is unlikely that anyone would consider the statements of the deceased to be spontaneous.

V. *Apparent Conflict*

The questions in *McCaskill* and *Starks* appear to be in conflict with the 1954 decision of the Mississippi Supreme Court, *Williams v. State*.[19] Here the Court overruled the trial judge's holding that certain testimony was part of the *res gestae*. In reversing, the court, speaking through Justice Ethridge, set this criterion for the admissibility of hearsay statements as a part of the *res gestae*:

> The acts and words must be spontaneous, and so closely related in time to the occurrence in question as reasonably to appear to be evoked and prompted by it.[20]

The trial judge apparently felt that anything concerning the crime and happening the night of the crime was a part of the *res gestae* and, thus, admissible.[21]

VI. Res Gestae *in Other Jurisdictions*

For the most part, the Mississippi Supreme Court has not varied from the majority of the other jurisdictions in their interpretation of *res gestae*.[22] Some states, however, have attempted to solve the *res gestae* dilemma. As early as 1924, the Connecticut Supreme Court of Errors allowed a hearsay statement to be admitted as a spontaneous exclamation without reference to *res gestae*.[23] Before the passage of the California Evidence Code in its present form, the rule had been to allow the trial court *no* discretion in determining whether or not to allow hearsay statements as a part of the *res gestae*.[24] This doctrine has now been replaced by a statute which allows hearsay statements, if made spontaneously

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[17] 215 So. 2d 691 (Miss. 1968).

[18] Houston Contracting Co. v. Atkinson, 251 Miss. 220, 227, 168 So. 2d 797, 798 (1964). Another case reaching the same result under similar circumstances is Merchants Co. v. Hutchinson, 186 So. 2d 760 (Miss. 1966).

[19] 220 Miss. 800, 72 So. 2d 147 (1954).

[20] *Id.* at 810, 72 So. 2d at 151.

[21] *Id.* at 809, 72 So. 2d at 149.

[22] *See generally*, 29 Am. Jur. 2d *Evidence* §§ 708-737 (1967); 31A C.J.S. *Evidence* §§ 403-421 (1964).

[23] Perry v. Haritos, 100 Conn. 476, 484, 124 A. 44, 47 (1924).

[24] Showalter v. Western Pacific R.R., 16 Cal. App.2d 460, 106 P.2d 895 (1940).

while the declarant is perceiving the event. The statement must be made before the declarant has had an opportunity to use his reflective powers, and the statement must describe, explain, or narrate the event.[25]

Georgia has defined *res gestae* by statute, but the same problems persist in attempting to apply the definition.[26]

VII. *Proposed Alternatives to* Res Gestae

Since most jurisdictions have difficulty applying and formulating a definition for *res gestae*, perhaps the abolition of this doctrine would be of benefit to lawyer and jurist alike. The *res gestae* doctrine is in essence nothing but an exception to the hearsay rule. There seem to be no valid policy arguments against the adoption of further exceptions to the rule, if the exceptions will aid the courts in the search for truth and promote judicial efficiency. The abolition of the *res gestae* doctrine in favor of two or three additional exceptions to the hearsay rule would go far in removing the inconsistencies and uncertainties of the doctrine. As long as the court can find the basic requisites of trustworthiness and necessity, there should be no insurmountable problems.

Wigmore, in his treatise on evidence,[27] criticizes the term *res gestae* as being both useless and harmful. Wigmore suggests that statements commonly admitted as a part of the *res gestae* be divided into two classes, "spontaneous exclamations" and "verbal acts." In the first class, where statements are made immediately prior to or after the incident in question, Wigmore contends that the nervous excitement of the participant or spectator makes the truth of the statement more probable since reflection is unlikely. "Verbal acts" are statements which may be admitted as the verbal part of an act, such as words accompanying conduct and giving it legal significance. Statements that are "verbal acts" do not constitute hearsay.

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has proposed new rules of evidence for the federal courts.[28] These rules will probably be adopted in the near future and must be mastered by Mississippi attorneys practicing in the federal courts. Three of the proposed rules could possibly alleviate the problems posed by the *McCaskill* decision.

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[25] CALIF. EVIDENCE CODE § 1240 (West's, 1966).

[26] GA. CODE ANN. § 38-305 (1954). "Res gestae—Declarations accompanying an act or so nearly connected therewith in time as to be free from all suspicion of devise or afterthought, shall be admissible in evidence as res gestae." *See also*, Butler v. Stewart, 112 Ga. App. 293, 145 S.E.2d 47, 49 (Ga. Ct. of App., Div. 2, 1965), where the court quoted 1 Greenlf. Ev. § 108: "True, the principal point to be observed in all cases is, whether the declarations offered in proof were contemporaneous with the main fact under consideration; for if they are merely the narrative of a past occurrence, they can not be received in evidence; still much latitude of discretion is allowed to the Courts."

[27] 6 J. WIGMORE, EVIDENCE §§ 1767, 1768 (3d ed. 1940).

[28] Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates* (March, 1969).

One of these proposed rules would allow, as an exception to the hearsay rule, an excited utterance which relates to an exciting event and is made while the speaker is still under the stress of the event.[29] When applying this rule to admit hearsay testimony, the availability of the declarant is immaterial. A second rule would allow hearsay testimony of declarant which is made while he is perceiving an event or immediately afterwards, provided his statement describes the event he is perceiving.[30] Again, the availability of the declarant is immaterial. As a safeguard, another rule would allow attacks on the credibility of the hearsay declarant just as though he had appeared as a witness.[31] Likewise, if attacked, the credibility of the hearsay declarant can be supported. In attacking and supporting the hearsay declarant, it is not required that he be presented an opportunity to explain or deny any evidence so offered.[32]

VIII. *Conclusion*

By applying the suggestions of Wigmore or the proposed federal rules to the cases cited and discussed in this note, it can be readily discovered that the Mississippi Supreme Court could direct the proper admission or exclusion of evidence without resort to a doctrine that is incapable of description or definition.

It is submitted that if the Court does not feel obliged to follow the guidelines for the admission of statements as part of the *res gestae* that have been promulgated in the past, it should abolish the doctrine. The establishment of new rules or the expansion of old rules would indeed be a difficult task; but the difficulty of the task has not prevented the court from finding solutions in the past. If the need for a rule has vanished, so should the rule.

Should the court believe that justice can best be served by expanding the reach of the *res gestae* doctrine—a trend in some jurisdictions—it should do so in clear and convincing terms, setting forth guidelines to aid the trial judge and practitioner in understanding this difficult evidentiary problem.

Thomas W. Tyner

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[29] *Id.* Rule 8-03 (2).
[30] *Id.* Rule 8-03 (1).
[31] *Id.* Rule 8-06.
[32] *Id.*

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